111-445

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 286.

THOMAS QUINN, PLAINTIFF IN ERROR,

vs.

WILLIAM S. CHAPMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED SEPTEMBER 3, 1881.

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1 In the Supreme Court of the State of California.

WILLIAM S. CHAPMAN, Plaintiff and Respondent,
vs.
THOMAS QUINN, Defendant and Appellant. } No. 5770.

Transcript on Appeal from the 19th District Court, City and County of San Francisco.

James B. Townsend, attorney for defendant; George A. Nourse, attorney for plaintiff.

Endorsed: Filed September 7th, 1877. D. B. Woolf, clerk, by H. P. Bush, deputy.

2 *Complaint.*

In the Supreme Court of the State of California.

In the district court of the nineteenth judicial district of the State of California within and for the city and county of San Francisco.

WILLIAM S. CHAPMAN *against* THOMAS QUINN.

The plaintiff in the above-entitled action, in his complaint, says that he is, and ever since the first day of May, A. D. 1871, has been the owner and seized in fee of one undivided half of the following described pieces or parcels of land, situate, lying, and being in the county of San Francisco, State of California, to wit: Lots four (4), five (5), and six (6), in section thirty-six (36) of township two (2) south, range six (6) west from the Monte Diablo base and meridian, according to the United States Government survey.

That one undivided half of said piece or parcels of land is,
3 and ever since the date above named has been, owned by the heirs of George Hollingsworth, late of said city and county, deceased.

That said defendant, Thomas Quinn, is in possession of said premises, and withholds possession thereof from this plaintiff, to his damage in the sum of one thousand dollars.

Wherefore said plaintiff demands judgment against said defendant for the possession of said premises and for said sum of one thousand dollars damages for withholding possession of the same.

WRIGHT & NOURSE,
Att'ys for Plaintiff.

[Duly verified by William S. Chapman, and filed August 27, 1872.]

Answer and Cross Complaint.

[Title of Court and Cause.]

And now comes the said defendant, and, in answer to the complaint of said plaintiff filed herein, upon and according to his information and belief, denies that said plaintiff was, at the time of the commencement of this action, or ever at any time has been the

owner or seized in fee or otherwise of one undivided half of, or of any portion or part whatever, of the pieces or parcels of land described in said complaint, or any of them, or any part thereof, and in like manner denies that his, said defendant's, possession of said land or his withholding of the possession thereof from said plaintiff, is a damage to the plaintiff in the sum of one thousand dollars, or in any sum of money whatever.

4 And for a further, separate, and second defence to said action, said defendant upon and according to his like information and belief, says that he, said defendant, was on the 1st day of May, A. D. 1871, and for a long time prior to that date, and ever since, has been and still is as against said plaintiff, the owner of said pieces and parcels of land, and seized thereof in fee, and entitled to the possession thereof and of every part thereof.

And for a further, separate, and third defence to said action, said defendant, upon and according to his like information and belief, says that under and by authority of the act of Congress of the United States, entitled "an act to ascertain and settle private land claims in the State of California," approved March 3d, 1851, Josefa De Haro and others claiming to be and being the heirs of one Francis de Haro, deceased, on the 16th day of March, 1852, filed before the board of commissioners created by said act, and in the office of the secretary of said board, their petition and claim in the form, and containing all the requisites prescribed therefor by said act, wherein they asked for confirmation to them of a tract of land which in said petition they alleged had been duly granted on or about the 27th day of September, A. D. 1835, by one Jose Castro, then fully exercising the functions of Governor of California under the authority of the then Mexican Government to one Jose Antonio Galindo, and had been thereafter, to wit, on or

5 about the 12th day of May, A. D. 1837, duly transferred and conveyed by said Galindo to said Francis de Haro, then in his lifetime, which tract of land they described in said petition as known under the name of "Laguna de la Merced," and bounded as follows, to wit: 1st. Commencing at the Rincon de San Bruno on the northeast corner of the Rancho Buri Buri, at low water mark on the shore of the Bay of San Francisco; thence westerly in a straight line along the northern bounndary of the Rancho Buri Buri through the Laguna Alta to the ocean. 2. Commencing at the first station; thence in a straight line to the top of the hill of San Bruno; thence along the ridge of the range of hills, extending thence in a nearly northern direction to the Portozuela or hollow, where the road leading from San Jose to San Francisco crosses the range of said hills. 3d. Thence north 39 degrees and 50 minutes west in a straight line to the ocean. 4th. Thence along the beach of the ocean to the terminating point of the first above described line, containing a little more than one league from north to south, and a half league from east to west, more or less.

That said tract of land, as above mentioned and as described in said petition, and claimed by said Josepha De Haro and others, covered and included the said lots and parcels of land mentioned and

described in said plaintiff's complaint herein and the whole thereof.

6 That under and by force and effect of the laws of the United States in that behalf provided, and the orders of the General Land Office thereof, said tract of land so claimed by the said Josepha De Haro and others, including the three parcels mentioned and described in said plaintiff's complaint, was from the date of the filing of said petition, to wit, from said 16th day of March, 1852, and has thence, down to the 19th of March, 1868, always remained and continued reserved from sale and excepted from the pre-emption laws of the United States, and that no law existed on said 15th day of March, 1852, or has existed at any time since that date, authorizing the sale or disposition by any officer or officers of the United States of said three parcels of land mentioned in said complaint, or any portion thereof, or the sale or disposition of any portion of said tract of land so claimed by the said Josefa de Haro and others, or authorizing or permitting the acquisition of any rights thereto whatever, legal or equitable, as against the said United States, under or by virtue of the so called pre-emption laws thereof, or otherwise, until after the said claim of the said Josefa de Haro and others, so made as aforesaid, should have been rejected, or ascertained, and determined, not to extend to and include the same.

That such proceedings were had upon the said petition and claim of the said Josefa de Haro and others after the filing of the same, and under and in accordace with said act of Congress, approved March 3d, 1851, and the other laws of the United

7 States applicable thereto; that said claim was on or about the 13th day of January, A. D. 1858, duly and finally confirmed by the decree of the district court of the United States, in and for the northern district of California, to the extent of an area of one-half of a square Mexican league of land, to be located and taken within the boundaries set forth in said petition and claim, but that the location of said half league so confirmed to said Josefa De Haro and others, was never ascertained or determined not to cover or include said three parcels of land mentioned in said complaint, or not to cover or include any part thereof until the — day of ——, A. D. 1866, when such ascertainment and determination was in effect made by the judgment, decree, and mandate of the Supreme Court of the United States, which was filed in said United States district court on the 21st day of March, A. D. 1866.

That no lawful plat of any lawful survey of said township two, south of range six, west of the Mount Diablo base and meridian, which includes said three parcels of land mentioned in said complaint, made or approved by the United States surveyor general for California was ever filed in the United States land office for the district of San Francisco, in which district said three parcels of land and said township are wholly situated until the 19th day of March, A. D. 1868, when said plat was duly filed in said land office, showing said three parcels of land mentioned in said complaint to be public land of the United States.

(1st amendment inserted here, folio 175.)

That afterwards, to wit, on the 5th day of February, A. D. 1869, this defendant, being then a single man, over the age of twenty-one years, and having heretofore duly and legally declared his intention to become a citizen of the United States, and possessing all the qualifications required to entitle him to avail himself of the privileges offered by the so-called pre-emption laws of the United States, and said plat of said township number two (2) south, of range number six (6) west of the Mount Diablo base and meridian, being then on file in said United States land office, in said district of San Francisco, in which said lots were situated, showing said lots, numbers four (4), five (5), and six (6) in section number thirty-six (36) of said township mentioned in said complaint to be, and the same then in fact being, public land of the United States, and subject to premption under the laws thereof, and before said lots, or any of them, had been offered for sale at public auction by the President of the United States, or under his authority, said lots being then wholly vacant, unoccupied, unimproved, and unappropriated, he, this defendant, took possession of, and entered and settled upon , said lots of land, under and by authority, permission, license, and invitation of the said laws, known as the pre-emption laws of the United States, claiming the same thereunder, and immediately thereafter erected a dwelling-house, and made and placed other valuable improvements thereon, and commenced resid-
9 ing thereon, and has ever since said entry and settlement continued to possess, occupy, cultivate, improve, and reside upon said lots of land, claiming the same as his right and property, under and by virtue and authority of the so-called pre-emption laws, and claiming the right to perfect his title thereto, and to obtain from the United States a patent therefor, upon compliance to the several requirements and provisions of said laws in such cases made and provided, which compliance this defendant has made, so far as in his power, and has always been ready, willing, and desirous to fully make, and thereupon to obtain such patent.

That at the time of this defendant's said entry and settlement upon said lots of land, he, this defendant, did not leave any other land which was his own in order to settle on said lots, nor was he then, nor has he at any time since been, nor is he now the owner of three hundred and twenty acres of land, or of any other land whatever in any State or Territory of the United States.

That at the time of his said entry and settlement upon said lots the same were wholly agricultural land, and no part thereof mineral land.

That this defendant has never had or obtained any other preemption or homestead right to any other land in the State of California or elsewhere, in any State or Territory of the United States.

That this defendant has never made any arrangement, agreement, or contract with any person or persons whomsoever, by
10 which, or by virtue of which, the title to said lots, or to any part thereof which he should or might acquire from the United States, should enure in whole or in part to the benefit of any other person or persons whatever except himself, said defendant,

nor did he settle upon said land for speculative purposes or to sell the same, but in good faith to appropriate the same to his own exclusive use and benefit.

That within three months next after this defendant's said settlement on said lots of land, this defendant went to said land office in said district of San Francisco, and then and there tendered to the register thereof, to be filed by him in said office as a record thereof, his written declaratory statement, duly signed by him, and containing all other legal requisites, wherein he set forth that he was a single man, over the age of twenty-one years, and a resident of the county of San Francisco in said State of California, and that he was over the age of twenty-one years at the time of his said settlement on said land, and had, previously thereto, duly declared his intention to become a citizen of the United States; that he settled on the said lots of land on the said 5th day of February, 1869, and therein described them as hereinabove described and mentioned, and as being in said section, township, and range, and that the same were situated in the county of San Francisco and within the district of lands subject to sale at the United States land office at San Francisco, California, and as containing the quantity of
11 $56\frac{1}{100}$ acres, and therein stated that the same had never been offered at public sale by order of the President of United States or otherwise, and that the same was not subject at said time to private entry, and therein further stated and gave notice that he intended to claim said lots of land as a pre-emption right, under the provisions of said pre-emption laws and other laws of the United States applicable thereto.

That this defendant, then and there, at the time of the tender of the said declaratory statement, also tendered to said register his lawful fees for filing said declaratory statement in said land office, as a record thereof, as aforesaid, to wit, the sum of three dollars in the lawful silver coin of the United States.

That said register then, and at all times since, has wrongfully refused to receive or to file said declaratory statement, although then and often since, tendered to him by this defendant for that purpose, with his legal fees, as aforesaid, for the filing of the same.

That this defendant duly appealed from the action and refusal of said register, as aforesaid, to the Commissioner of the General Land Office of the United States, and in and by said appeal, requested the said Commissioner to instruct and cause the said register to file said declaratory statement, and to allow him to prove up and perfect his right and claim to said land, under the said pre-emption
12 laws of the United States, and to pay for the same; but that the said commissioner wrongfully and in violation of this defendant's rights in the premises, on the 29th day of April, A. D. 1870, refused so to instruct said register, or to grant him, this defendant, any relief whatever in the premises, and affirmed the said action of said Register.

That this defendant thereupon, on June 17th, 1870, duly appealed to the Secretary of the Department of the Interior from the said decision and refusal of the said Commissioner and Register,

and in and by such appeal requested and prayed the said Secretary to direct, order, and instruct the said Commissioner to instruct the said Register to receive and file this defendant's said declaratory statement in the said Land Office, and to grant him the other relief above specified; but the Secretary, on the 17th day of January, 1871, upon such appeal, wrongfully and illegally refused so to do, and refused to grant to this defendant the relief in the premises to which he was by law entitled, or any relief therein whatsoever.

That this defendant immediately, upon being advised and informed of the said action and decision of the said Secretary, to wit, on the 18th day of March, 1871, protested against the same, and asked for a re-hearing of his said appeal, but the same was by said Secretary, on the 7th day of April, 1871, refused and denied.

That this defendant has never been allowed by said officers of the United States, to make or present the proofs of his right of
13 pre-emption in and to said land, although he has always, since his said settlement thereon, been ready and willing so to do, and has often tendered the same, and offered to comply in all respects whatsoever with the requirements of said pre-emption laws, and is still ready and willing so to do.

That this defendant has often, since his said settlement, and the said tender of his said declaratory statement, offered to prove before said register and receiver at said land office at San Francisco, by two or more competent witnesses, that at the time of said settlement on said lots of land, he was a single man over the age of twenty-one years, and had duly declared his intention of becoming a citizen of the United States. That immediately upon such settlement, he erected a dwelling house upon said land, and has resided thereon ever since; that he did not leave any land of his own to settle on said land; that he never had any other right of pre-emption or homestead right to any other land in the State of California, or elsewhere; that said land was not mineral land of any kind, but was, and ever has been, agricultural land; that he made no agreement or contract in any way or manner, with any other person or persons whomsoever, by which the title which he might acquire from the United States should enure to the benefit of any other person or persons whomsoever, except himself; that he had plowed, sowed, and cultivated, in grain and other agricul-
14 tural products, the whole of said land, each year since his said settlement; that he inclosed the same with a good and substantial inclosure immediately after his said settlement, and has kept the same so inclosed ever since; and that he had made and erected on said land, permanent and durable improvements of the value of several hundred dollars.

That this defendant has at all times since his said settlement, been ready to make, subscribe and file with said register the affidavit required by said pre-emption laws, upon proving up a pre-emption right, and to comply in all other respects with the provisions of said laws, and with the rules and regulations of said Commissioner of the General Land Office of the United States, in order thereby to obtain and procure the legal title to said land from the said

United States under said laws, but that this defendant has been alwas wrongfully and illegally hindered and prevented from doing so by the said register and receiver of said land office, and by said Commissioner and Secretary.

That after the tender of said proof of his pre-emption right as aforesaid, and the tender of said affidavit, and prior to the 28th day of January, A. D. 1871, this defendant applied to said register and receiver to purchase said lots of land from the United States, and then and there offered the lawful purchase price thereof to said receiver on behalf of said United States, and for their use and
15 benefit, to wit, the sum of seventy dollars and eight and three-fourths cents ($70.08¾) in the lawful money of the United States, together with all lawful percentage, costs, and charges incident to such purchase; but that said register and receiver then and there refused to allow this defendant to purchase said land, and said receiver refused to accept on behalf of said United States the said purchase price thereof, or any part thereof, or said percentage, costs or charges, and that they have always since so refused, and do still so refuse.

And this defendant, upon and according to his information and belief, further states, that shortly after the filing in said United States district court, of the decree and mandate of said United States Supreme Court, determining in effect that the half league of land so as aforesaid confirmed to the said Josefa de Haro and others, did not cover nor include said three parcels of land mentioned in said plaintiff's complaint, he, said plaintiff, not being himself qualified as a pre-emptor, nor entitled to claim or acquire the rights of pre-emption to any public land of the United States under the laws thereof, formed the purpose and undertook to obtain from the said United States, for his own use and benefit, the title of the United States to said three parcels of land above-mentioned, fraudulently, contrary to the laws of the said United States by false testimony and under and by means of the false pretence that one George Hollingsworth, then deceased, had, in his lifetime, settled upon, improved, and resided upon said threee parcels of land,
16 and had thereby acquired the rights of pre-emptor in and to said three parcels of land, and that such pre-emption rights had, by the death of the said George Hollingsworth, become vested in a wife and in children of the said George Hollingsworth.

That in execution of said illegal and fraudulent purpose and undertaking he, said plaintiff, thereafter, and prior to the 12th day of November, A. D. 1867, caused and procured to be fabricated a certain instrument of writing, in the form of a petition, addressed to the probate court of the county of San Francisco, bearing no date, but purporting to be signed by Benjamin Hollingsworth, David Hollingsworth, and Edwin Hollingsworth, as petitioners, in the presence of Joe L. Bond and Wm. W. Pattison, as attesting witnesses thereto, which instrument of writing stated, among other things, and in substance, that the said petitioners, David Hollingsworth, Benjamin Hollingsworth, and Edwin Hollingsworth, were the only sons of George Hollingsworth, deceased, and as such were entitled to ad-

minister upon the estate of said deceased; that the said George Hollingsworth, in the year A. D. 1850, removed from the county of Monroe, in the State of Missouri, to the State of California; that on or about the — day of November, A. D. 1855, he died intestate, being then a resident of the county of San Francisco, in said State of California, and leaving estate therein, consisting of a pre-emption
17 claim and the improvements thereon, upon public lands of the United States, to wit, on lands then included in the fractional southeast quarter of section number thirty-six (36), in township number two (2) south, of range number six (6) west; that the family of said deceased resided in said Monroe county at the date of said George Hollingsworth's removal to California, and still resided there, except said Benjamin Hollingsworth, who was then a resident of the State of; Louisiana; that on the — day of November, 1855, the family of said deceased consisted of Elizabeth, wife of said deceased, and of David Hollingsworth, Benjamin Hollingsworth, and Edward Hollingsworth, his only sons, and Virginia Hollingsworth, his only daughter; that on the — day of May, A. D. 1857, the said Elizabeth, wife of said deceased, died intestate; that said David Hollingsworth was then of the age of twenty-nine (29) years, said Benjamin Hollingsworth of the age of twenty-six (26) years, said Edwin Hollingsworth of the age of seventeen (17) years, and said Virginia Hollingsworth of the age of nineteen (19) years, and that the said Virginia was then a *femme sole;* that they, the said David Hollingsworth, Benjamin Hollingsworth, and Edwin Hollingsworth did not desire to undertake to administer upon said estate, but that said William S. Chapman, a resident of said county of San Francisco, had consented to serve in that capacity, as appeared by his petition for letters of administration presented and filed there-
18 with in said probate court, and that they therefore prayed the said probate court that said William S. Chapman be appointed in their stead administrator of the estate of said George Hollingsworth, deceased; and that at or about the same time he, said plaintiff Chapman, likewise caused and procured to be fabricated and annexed to said petition a certain other instrument of writing, in the form of an affidavit, purporting to have been made and signed by Benjamin Hollingsworth, and to have been by him sworn to on the 29th day of June, A. D. 1866, before Joseph D. Copeland, therein stated to be a notary public at Arcadia, in Bienville parish, in the State of Louisiana, in and by which affidavit, or supposed affidavit, the said or supposed Benjamin Hollingsworth is represented as deposing to and acknowledging his execution of said petition, or pretended petition, above mentioned; and that at or about the same time he, said Chapman, further caused and procured to be fabricated and prefixed to said petition, or pretended petition, a certain other instrument of writing, likewise in the form of an affidavit, headed:

"In the probate court, in and for the county of San Francisco, California. In the matter of the estate of George Hollingsworth," and purporting to have been singed by J. C. Kipper and Thomas Sanders, and to have been by them sworn to on the 16th day of August, A. D. 1866, in the county of Monroe, in the State

19 of Missouri, before Henry Davis, clerk of the circuit court in and for said county of Monroe, in and by which last mentioned affidavit, or supposed affidavit, the said, or supposed, Kipper and Sanders are represented as deposing and stating among other things and in substance, that they resided at —, in Monroe county, State of Missouri; that about the year A. D. 18—, or prior thereto, they became acquainted with the said George Hollingsworth and his family; that they had known said family ever since, and knew said George until his removal from said State of Missouri to said State of California, to wit: about the year A. D. 1850; that on the — day of —, A. D. 1857, the said family of said George Hollingsworth consisted of his wife, Elizabeth, and his sons, David Hollingsworth, Benjamin Hollingsworth and Edwin Hollingsworth, and his daughter, Virginia Hollingsworth; that said Elizabeth, wife of said George Hollingswoath, died intestate on or about the — day of May, A. D. 1857; that the said Virginia Hollingsworth was then unmarried; that the said children, except the said Benjamin Hollingsworth, were then living in said Monroe county, and were of the following ages respectively, to wit: said David Hollingsworth of the age of about 29 years, said Benjamin Hollingsworth of the age of about 26 years, said Edwin Hollingsworth of the age of about 17 years, and said Virginia Hollingsworth of the age of about 19 years; that they, said affiants, or supposed affiants, had

20 read and knew the contents of a certain petition, dated at Paris, Monroe county, Missouri, the — day of —, 1866, to the probate court in and for the county of San Francisco, in said State of California, wherein it was stated said David Hollingsworth, Benjamin Hollingsworth and Edwin Hollingsworth, did not desire to undertake the administration of the estate of said George Hollingsworth, deceased, and contained the request: William S. Chapman, a resident of the county of San Francisco, in said State of California, may be appointed in their stead as administrator of the said estate; that said petition was signed by said David Hollingsworth, and said Benjamin Hollingsworth, and said Edwin Hollingsworth, known to said affiants, or supposed affiants, to be the persons named in said petition as the petitioners thereof, and that said several petitioners, except the said Benjamin Hollingsworth, in person acknowledged to said affiants, or supposed affiants, that they, said petitioners, had so signed the same, for the purposes therein mentioned, and that said petitioners so signing the same were known to said affiants, or supposed affiants, to be the identical persons named in said petition as the sons of said George Hollingsworth, deceased.

That in further execution of his said illegal and fraudulent purpose and undertaking he, the said William S. Chapman, on the 12th day of November, A. D. 1867, filed in the probate court of the said city and county of San Francisco, a petition signed and

21 sworn to by him wherein he, the said Chapman, among other things and in substance, stated that George Hollinsworth died intestate in the city and county of San Francisco, in said State, in the month of November, 1855, leaving estate in said

county of San Francisco, consisting of a pre-emption claim of and to the lots of land thereinafter described and mentioned; that due search and inquiry had been made to ascertain if said deceased left any will and testament, but that none could be found, and that, according to the best knowledge and belief of the said petitioner, Chapman, said deceased died intestate; that the estate of the said deceased, so far as he could ascertain, was of the value of about five thousand seven hundred dollars, and consisted of a certain pre-emption right or claim and that the improvements thereon made by said deceased in his life-time; that said claim was situated in the county of San Francisco, and consisted of the fractional south-east quarter of section number thirty-six (36,) in township number two (2) south, of range number six (6) west, of the Mount Diablo meridian; that the said deceased died leaving surviving him his widow, Elizabeth Hollingsworth, and four children, viz., three sons David Hollingsworth, then aged thirty (30) years, Benjamin Hollingsworth, aged twenty-seven (27) years, and Edwin Hollingsworth, aged eighteen (18) years, and one daughter, Virginia Hollingsworth, aged twenty (20) years; that the said Elizabeth Hollingsworth, widow of the said deceased, died intestate in Monroe county in
22 the State of Missouri, sometime in the month of May, in the year 1857, and that the only heirs of the said George Hollingsworth, deceased, then surviving, so far as known to the said petitioner, Chapman, were said above-mentioned children, who all then resided in Monroe county, in the said State of Missouri, with the exception of the said Benjamin Hollingsworth, who then resided in Bienville parish, in the State of Louisiana; that the said Benjamin Hollingsworth, David Hollingsworth, and Edwin Hollingsworth, the said children and heirs of the said George Hollingsworth, deceased, had requested of him, said petitioner, his consent to be appointed administrator of said estate; that he, said petitioner, consented to act as such administrator, and the said Chapman therein prayed that a day of court might be appointed for the hearing of his said petition, and that notice thereof should be given, and that upon such hearing letters of administration upon the estate of the said George Hollingsworth might be granted and issued to him, said petitioner, and that, in support of his said Chapman's petition and application for letters of administration upon the estate of the said George Hollingsworth, he, the said Chapman, on the same day, filed in said probate court said petition and affidavits, or pretended affidavits, so caused and procured by him to be fabricated, as above set forth.

That such proceedings were thereafter had in said probate
23 court that, upon the hearing of the said petition of the said Chapman, supported by the said fabricated petition and affidavits above mentioned, and by the testimony of the said Chapman and other testimony adduced by him, and without any appearance of the said or supposed David Hollingsworth, Benjamin Hollingsworth, Edwin Hollingsworth or Virginia Hollingsworth, or the appointment or appearance of any attorney to represent them, or to represent any infant or absent heirs, if any existed, an order of

said probate court was made and entered on the 26th day of November, A. D. 1867, appointing, or purporting to appoint, the said William S. Chapman administrator of the estate, or supposed estate, of the said George Hollingsworth, deceased, and directing letters of administration to be issued by the clerk of said court to him, said Chapman, upon his filing a bond in the sum of $1,000, approved by the judge of said court, and taking the oath prescribed by law for the faithful discharge according to law of his duties as such administrator.

That the said Chapman neglected thereafter to file any bond or to take or subscribe any oath as such administrator until after the filing in the said United States Land Office, at San Francisco, of the said plat of survey of said township number two (2) south, of range number six (6) west, of Mount Diablo base and meridian, as aforesaid, to wit: until the 7th day of April, A. D. 1868, when he, said Chapman, filed such bond, and thereafter, on the 8th day of April, A. D. 1868, subscribed such oath and received such letters of administration.

24 That on the same day, to wit, said 8th day of April, A. D. 1868, under color or by virtue, or supposed virtue, of said letters of administration, and in further prosecution of his said illegal and fraudulent purpose and undertaking, he, said Chapman, filed in the United States Land Office, in and for said district of San Francisco, a paper purporting to be a declaratory statement under the pre-emption laws of the United States, and purporting to be made by him, said Chapman, as such administrator, wherein it was, among other things and in substance, stated that the said George Hollingsworth had in his lifetime, and in the month of August, A. D. 1853, settled upon and improved said lots, numbered four (4), five (5), and six (6), in section number thirty-six, township number two (2) south, of range number six (6) west, of the Mount Diablo meridian, claiming the same under the pre-emption laws of the United States, and that the said George Hollingsworth had thereafter resided thereon until his death, which took place in said city and county of San Francisco in the month of November, A. D. 1855, and that he, said George Hollingsworth, had left him surviving several children, then living, on behalf of whom said declaratory statement was filed.

In brackets, stricken out by 2d am'd't; see fol. 179:

[That at the time of the filing of the said declaratory statement by the said Chapman, as aforesaid, one Obadiah Livermore and one Justus Bepler set up and pretended to have some claim or
25 claims to said lots four (4), five (5), and six, above mentioned, and that thereafter, on or about the 18th day of August, A. D. 1868, the said Livermore, Bepler, and the said Wm. S. Chapman appeared before the register and receiver of said United States Land Office in said district of San Francisco, and there and thereafter presented testimony in support of their respective claims, which testimony was reduced to writing and filed with said register and receiver.

That thereafter, and long after this defendant had entered, settled, built a dwelling-house, and commenced to reside upon said lots of land, and had tendered to said register, to be filed by him in said Land Office as a record thereof, his, this defendant's, declaratory statement, giving notice of his said settlement upon, and his claim to, said three lots of land, under the pre-emption laws of the United States, and had tendered to said register his, said register's, lawful fees for filing the same, and whilst this defendant was actually occupying, residing upon, cultivating, improving, and claiming said lots of land, under and in accordance with the provisions of said pre-emption laws, and without any notice whatever at any time given to this defendant, or any opportunity offered or allowed him by said register and receiver, or by either of them, to present or make any proof of his, this defendant's, settlement and residence upon, improvement of, and right to said lots of land under said pre-
emption laws, and after their refusal to allow him to make
26 such proof, to wit, on or about the 2d day of September, A. D. 1869, the said register and receiver decided and declared that the said Obadiah Livermore, claiming said lots of land as a purchaser thereof from, and a locator thereof under and in the name and right of the State of California, was entitled to said lots of land, and that neither the said Bepler nor the said Chapman was entitled thereto.

That the said Chapman thereupon appealed from said decision of said register to the Commissioner of the General Land Office of the United States, and that without reading or making any examination of the testimony or papers transmitted to him by said register and receiver on such appeal, or any part thereof, said Commissioner, on the 27th day of May, A. D. 1870, signed a paper which decided said appeal in favor of the said Chapman.

That thereafter the said Livermore and Bepler, respectively, appealed from the said decision of the said Commissioner to the Secretary of the Department of the Interior of the United States, and that without reading or making any examination of the testimony or papers filed upon such appeal, or any part thereof, he, said Secretary, on the 6th day of January, A. D. 1871, signed a paper which affirmed the decision of said Commissioner and decided the said appeal in favor of the said Chapman.]

(Amend't of Jan. 17th, 1876, inserted here; see fol. 218.)

That thereafter, to wit, on the 28th day of January, A. D. 1871, the said Wm. S. Chapman paid to the said receiver of the
27 said United States land office, at San Francisco, the sum of one dollar and a quarter per acre for said lots of land, to wit, the sum of seventy dollars or thereabouts, together with the fees of said register and receiver, and thereupon received from said register a cartificate of purchase of said lots of land, and by means of such certificate of purchase, thereafter, to wit, on the — day of —, A. D. 1871, and prior to the commencement of this action, obtained a patent for said three lots of lands, issued in the name of the United States, and purporting to convey the title of the said United

States in and to said lots, [to him, said Chapman.]—(Stricken out and insertion made by am'd't of Jan. 17th, 1876. See folio 223.)

And this defendant upon and according to his information and belief, avers:

That in truth and in fact, the said George Hollingsworth never did, in his lifetime, settle, build a dwelling-house or reside upon or cultivate or improve said three lots of land, or any of them, or any part thereof, and that the said George Hollingsworth never in his lifetime acquired the rights of a pre-emptor, nor any right whatever in or to said lots of land, or any of them, or any part thereof, nor ever in his lifetime claimed the same or any part thereof, under the pre-emption laws of the United States, or otherwise, and that these facts were well known to the said Chapman at the time of his taking all the proceedings hereinbefore stated; that said land was not at any time during the lifetime of the said George Hollingsworth, subject to pre emption, nor could any right thereto be
28 acquired under or by virtue of the pre-emption laws of the United States, in any manner nor by any person whatsoever; that the said George Hollingsworth had not and did not leave at the time of his death, any wife, children, or child him surviving; that the said petition purporting to have been signed by Benjamin Hollingsworth, David Hollingsworth, and Edwin Hollingsworth, as petioners therein, and by Joe L. Bond and Wm. W. Pattison, as attesting witnesses thereto, and the said affidavit thereto annexed, purporting to have been signed and sworn to by Benjamin Hollingsworth, and the certificate thereto of such signature and swearing, purporting to have been signed by Joseph D. Copeland, a notary public, at Arcadia, in Bienville parish, in the State of Louisiana, and the other affidavit prefixed to said last mentioned petition, purporting to have been signed and sworn to by J. C. Kipper and Thomas Sanders, and the certificate thereto of such signature and swearing, purporting to have been signed by Henry Davis, clerk of the circuit court, in and for the county of Monroe, in the State of Missouri, were not in fact, nor was any of them, ever signed or sworn to by any such person or persons, as they respectively purport to have been signed and to have been sworn to by; and that the said Chapman well knew said above recited facts, but caused and procured said petition and said several affidavits and certificates to be fabricated, and filed the same with his, said Chapman's
29 own petition, in said probate court, as before stated, in order that he might, by means thereof, obtain from said probate court, letters of administration upon the supposed and pretended estate of the said George Hollingsworth, deceased; and that he, the said Chapman, petitioned for and obtained such letters of administration, filed in said United States Land Office, at San Francisco, said declaratory statement, presented before said register and receiver of said Land Office testimony in support of said pretended pre-emption claim, set up by him, said Chapman, in the name of the said George Hollingsworth, deceased; [and thereafter prosecuted said claim before the Commissioner of the General Land office, and before the Secretary of the Department of the Interior

of the United States], (stricken out 3d amdt.; see fol. 179), and procured and obtained said patent for said three parcels of land, as above stated and shown, not in good faith nor for the purpose of actually administrating according to law upon the estate, or upon any estate in fact, left by said George Hollingsworth, nor for the benefit of any creditors, heirs or distributees of the said George Hollingsworth, but solely for the purpose of obtaining from the said United States, fraudulently and contrary to the laws thereof, their title to said three lots of land, for the sole use benefit and private gain of him said Chapman; that the said Chapman had not, at the time of the commencement of this action, nor has he now any right or title whatsoever, in or to said lots of land, or any of them, or any part
30 thereof, except that so as aforesaid fraundulently acquired and obtained by him, under and by means of said proceedings and said patent; that the said Chapman was not, at the time of his taking any of said proceedings, or doing or causing to be done any of said acts hereinbefore stated, qualified according to law to pre-empt, or to become a purchaser by pre-emption of any public land of the United States, and that consequently, and that for the other reasons herein set forth and shown, all the acts and proceedings of the said Chapman, resulting in the obtaining from the said United States of said patent for said land, have been in fraud of the rights of this defendant thereto, as herinbefore stated and set forth, and consequently he, the said Chapman, ought, by this honorable court, to be held and adjudged a trustee of the legal title of said land, to and for the use and benefit of this defendant, and ought not to be allowed to assert such legal title, or to recover the possession of said land as against this defendant, as sought in and by this present action.

Wherefore, said defendant prays judgment in his favor and for his costs and disbursements herein expended.

And by way of cross complaint, and for the purpose of obtaining from this court and in this action, affirmative relief in this defendant's favor, against the said plaintiff Wm. S. Chapman, this defendant, upon and according to his information and belief, alleges:

31 That under and by authority of the act of Congress of the United States, entitled "An act to ascertain and settle the private land claims in the State of California," approved March 3d, 1851, Jorefa de Haro and others claiming to be and being the heirs of one Francisco de Haro, deceased, on the 16th day of March, 1852, filed before the board of commissioners, created by said act, and in the office of the secretary of said board, their petition and claim in the form, and containing all the requisites prescribed therefor by said act, wherein they asked for confirmation to them of a tract of land, which in said petition they alleged had been duly granted, on or about the 27th day of September, A. D. 1835, by one Jose Castro, then lawfully exercising the functions of Governor of California, under the authority of the then Mexican Government, to one Jose Antonio Galindo, and been thereafter, to wit, on or about the 12th day of May, A. D. 1837, duly transferred and

conveyed by said Galindo to said Francisco de Haro, then in his lifetime, which tract of land they described in said petition, as known under the name of "Laguna de la Merced," and as bounded as follows, to wit: 1st. Commencing at the Rincon de San Bruno, on the northeast corner of the Rancho Buri Buri, at low water mark, on the shore of the Bay of San Francisco; thence westerly in a straight line along the northern boundary of the Rancho Buri Buri,
32 through the Laguna Alta to the ocean. 2d. Commencing at the first station; thence in a straight line to the top of the hill of San Bruno; thence along the ridge of the range of hills, extending thence in a nearly northern direction to the portazuelo or hollow, where the road leading from San Jose to San Francisco crosses the range of said hills. 3d. Thence north 39 degress and 50 minutes west, in a straight line to the ocean. 4th. Thence along the beach of the ocean to the terminating point of the first above described line; containing a little more than one league from north to south, and a half league from east to west, more or less.

That said tract of land as above mentioned, and as described in said petition and claimed by said Josefa de Haro and others, covered and included the said lots and parcels of land mentioned and described in said plaintiff's complaint herein and the whole thereof.

That under and by force and effect of the laws of the United States in that behalf provided, and the orders of the General Land Office thereof, said tract of land so claimed by the said Josefa de Haro and others, including said three parcels mentioned and described in said plaintiff's complaint, was from the date of the filing of said petition, to wit, from said 16th day of March, 1852, and has thence, down to the 19th day of March, A. D. 1868, always remained and continued reserved from sale and excepted from the operation of the pre-emption laws of the United States, and that no
33 law existed on said 16th day of March, 1852, or has existed at any time since that date, authorizing the sale or disposition by any officer or officers of the United States of said three parcels of land mentioned in said complaint or any portion thereof; or the sale or disposition of any portion of said tract of land so claimed by the said Josefa de Haro and others, or authorizing or permitting the acquisition of any rights thereto whatever, legal or equitable, as against the said United States, under or by virtue of the so-called pre-emption laws thereof, or otherwise, until after the said claim of the said Josefa de Haro and others, so made as aforesaid, should have been finally rejected, or ascertained or determined, not te extend to and include the same.

That such proceedings were had upon the said petition and claim of the said Josefa De Haro and others, after the filing of the same, and under and in accordance with said act of Congress, approved March 3d, 1851, and the other laws of the United States applicable thereto; that said claim was, on or about the 13th day of January, A. D. 1858, duly and finally confirmed by the decree of the district court of the United States, in and for the northern district of California, to the extent of an area of one-half of a square Mexican

league of land, to be located and taken within the boundaries set forth in said petition and claim, but that the location of said half league so confirmed to said Josefa De Haro and others was never ascertained or determined not to cover or include said three
34 parcels of land mentioned in said complaint, or not to cover or include any part thereof, until on or about the — day of ——, A. D. 1866, when such ascertainment and determination was in effect made by the judgment decree and mandate of the Supreme Court of the United States, which was filed in said United States district court on the 21st day of March, A. D. 1866.

That no lawful plat of any lawful survey of said township two south, of range six west, of the Mount Diablo base and meridian, which includes said three parcels of lands mentioned in said complaint, made and approved by the United States surveyor general for California, was ever filed in the United States land office for the district of San Francisco, in which district said three parcels of land and said township are wholly situated, until the said 19th day of March, A.D. 1868, when such plat was duly filed in said land office, showing said three parcels of land mentioned in said complaint to be public land of the United States.

(4th amendment inserted here; see fol. 180.)

That afterwards, to wit, on the 5th day of February, A. D. 1869, this defendant, being then a single man over the age of twenty-one years, and having theretofore duly and legally declared his intention to become a citizen of the United States, and possessing all other qualifications required to entitle him to avail himself of the privileges offered by the so-called pre-emption laws of the United States, and said plat of said township number two (2) south, of range No. six (6) west, of the Mount Diablo base and meridian, being
35 then on file in said United States land office, in said district of San Francisco, in which said lots were situated, showing the said lots numbers four (4), five (5), and six (6), in section number (36) thirty-six, of said township, mentioned in said complaint to be, and the same then in fact being, public land of the United States, and subject to pre-emption under the laws thereof, and before said lots or any of them had been offered for sale at public auction by the President of the United States or under his authority, said lots being then wholly vacant, unoccupied, unimproved, and unappropriated, he, this defendant, took possession of and settled upon said lots of land under and by authority, permission, license, and invitation of the said laws known as the pre-emption laws of the United States, claiming the same thereunder, and immediately thereafter erected a dwelling-house and made and placed other valuable improvements thereon, and commenced residing thereon, and has, ever since said entry and settlement, continued to possess, occupy, cultivate, improve, and reside upon said lots of land, claiming the same as his right of pre-emption under and by virtue and authority of said so-called pre-emption laws, and claiming the right to perfect his title thereto, and to obtain from the United States therefor, upon compliance with the several requirements and provisions

of said laws in such cases made and provided, which compli-
36 ance this defendant has made so far as in his power, and has always been ready, willing, and desirous to fully make, and thereupon to obtain such patent.

That at the time of this defendant's said entry and settlement upon said lots of land he, this defendant, did not leave any other land which was his own in order to settle on said lots, nor was he then, nor has he at any time since been, nor is he now, the owner of three hundred and twenty acres of land, or of any other land whatever in any State or Territory of the United States.

That at the time of his said entry and settlement upon the lots, the same were wholly agricultural land, and no part thereof mineral land.

That this defendant has never had or obtained any other pre-emption or homestead right to any other land in the State of California, or elsewhere in any other State or Territory of the United States.

That this defendant has never made any arrangement, agreement or contract with any person or persons whomsoever, by which, or by virtue of which the title to said lots, or to any part thereof, which he should or might acquire from the United States, should enure in whole or in part to the benefit of any other person or persons, whomsoever, except himself, said defendant; nor did he settle upon said land for speculative purposes or to sell the same, but in good faith to appropriate the same to his own exclusive use and benefit.

That within three months next after this defendant's said
37 settlement on said lots of land, this defendant went to said land office in said district of San Francisco, and then and there tendered the register thereof to be filed by him in said office as a record thereof, his written declaratory statement, duly signed by him and containing all other legal requisites, wherein he set forth that he was a single man, over the age of twenty-one years, and a resident of the county of San Francisco, in said State of California, and that he was over the age of twenty-one years at the time of his said settlement on said land, and had previously thereto duly declared his intention to become a citizen of the United States, that he settled on said lots of land on the said 5th day of February, 1869, and therein described them as herein above described and mentioned, and as being in said section, township, and range, and that the same were situated in the county of San Francisco, and within the district of lands subject to sale at the United States Land Office at San Francisco, California, and as containing the quantity of $56\frac{7}{100}$ acres, and therein stated that the same had never been offered at public sale by the President of the United States, or otherwise, and that the same was not subject at said time to private entry, and therein further stated and gave notice that he intended to claim said lots of land as a pre-emption right, under the provisions of said pre-emption laws and other laws of the United States applicable thereto.

38 That this defendant then and there, at the time of the ten-

der of said declaratory statement, also tendered to said register his lawful fees for filing said declaratory statement in said land office as a record thereof as aforesaid, to wit, the sum of three dollars, in the lawful silver coin of the United States.

That said register then, and at all times since, has wrongfully refused to receive or to file said declaratory statement, although then and often since tendered to him by this defendant for that purpose, with his legal fees as aforesaid, for the filing of the same.

That this defendant duly appealed from the said action and refusal of said register as aforesaid to the Commissioner of the General Land Office of the United States, and in and by said appeal requested the said Commissioner to instruct and cause the said register to file said declaratory statement, and to allow him to prove up and perfect his right and claim to said land, under the said pre-emption laws of the United States, and to pay for the same; that the said Commissioner wrongfully, and in violation of this defendant's rights in the premises, on the 29th day of April, A. D. 1870, refused so to instruct said register, or to grant him, this defendant, any relief whatever in the premises, and affirmed the said action of said register.

That this defendant thereupon, on June 17, 1870, duly appealed to the Secretary of the Department of the Interior from the
39 said decision and refusal of the said Commissioner and register, and in and by such appeal requested and prayed the said Secretary to direct, order, and instruct the said Commissioner to instruct the said register to receive and file this defendant's said declaratory statement in the said Land Office, and to grant him the other relief above specified, but the said Secretary, on the 17th day of January, 1871, upon such appeal, wrongfully and illegally refused so to do, and refused to grant to this defendant the relief in the premises, to which he was by law entitled, or any relief therein whatsoever.

That this defendant immediately upon being advised and informed of the said action and decision of the said Secretary, to wit, on the 18th day of March, 1871, protested against the same and asked for a rehearing of his said appeal, but the same was by said Secretary, on the 7th day of April, 1871, refused and denied.

That this defendant has never been allowed by said officers of the United States to make or present the proofs of his right of pre-emption in and to said land, although he has always since his said settlement thereon been ready and willing so to do, and has often tendered the same, and offered to comply in all respects whatsoever with the requirements of said pre-emption laws, and is still ready and willing so to do.

That this defendant has often since his said settlement, and the said tender of his said declaratory statement, offered to prove
40 before said register and receiver of said land office at San Francisco, by two or more competent witnesses, that at the time of his said settlement on said lots of land he was a single man, over the age of twenty-one years, and had duly declared his intention to become a citizen of the United States; that immedi-

ately upon such settlement he erected a dwelling-house upon said land, and has resided thereon ever since; that he did not leave any land of his own to settle on said land; that he never had any other right of pre-emption or homestead right to any other land in the State of California or elsewhere; that said land was not mineral land of any kind, but was, and ever has been, agricultural land; that he had made no agreement or contract in any way or manner with any other person or persons whomsoever, by which the title which he might acquire from the United States should enure, in whole or in part, to the benefit of any other person or persons whomsoever except himself; that he had plowed, sowed, and cultivated in grain and other agricultural products the whole of said land each year since his said settlement; that he inclosed the same with a good and substantial inclosure immediately after his said settlement, and has kept the same so inclosed ever since, and that he made and erected on said land permanent and durable improvements of the value of several hundred dollars.

That this defendant has at all times since his said settle-
41 ment been ready to make, subscribe, and file with said register the affidavit required by said pre-emption laws, upon proving up a pre-emption right, and to comply in all other respects with the provisions of said laws and with the rules and regulations of said Commissioner of the General Land Office of the United States, in order thereby to obtain and procure the legal title to said land from the said United States under said laws, but that this defendant has been always wrongfully and illegally hindered and prevented from doing so by the said register and receiver of said land office, and by said Commissioner and Secretary.

That after the tender of said proof of his pre-emption right as aforesaid and the tender of said affidavit, and prior to the 28th day of January, A. D. 1871, this defendant applied to said register and receiver to purchase said lots of land from the United States, and then and there offered the lawful purchase price thereof to said receiver on behalf of said United States, and for their use and benefit, to wit, the sum of seventy dollars and eight and three-fourth cents, (70.08¾-100,) in the lawful money of the United States, together with all lawful percentage, cost, and charges incident to such purchase, but the said register and receiver then and there refused to allow this defendant to purchase said land, and said receiver refused to accept on behalf of said United States the said purchase price thereof, or any part thereof, or said percentage, costs, and charges, and that they have always since so refused and still do so refuse.

42 And this defendant, upon and according to his information and belief, further states that shortly after the filing in said United States district court of the decree and mandate of said United States Supreme Court, determining in effect that the half league of land so, as aforesaid, confirmed to the said Josefa De Hara and others, did not cover nor include said three parcels of land mentioned in said plaintiff's complaint, he, said plaintiff, not being himself qualified as a pre-emptor, or entitled to claim or acquire the

right of pre-emption to any land of the United States under the laws thereof, formed the purpose, and undertook to obtain from the said United States for his own use and benefit the title of the said United States to said three parcels of land above described, fraudulently, contrary to the laws of the said United States, by false testimony, and under and by means of the false pretence that one George Hollingsworth, then deceased, had in his lifetime settled upon, improved, and resided upon said three parcels of land, and had thereby acquired the right of a pre-emptor in and to said three parcels of land, and that such pre-emption right had, by the death of the said George Hollingsworth, become vested in a wife and in children of the said George Hollingsworth.

That in execution of said illegal and fraudulent purpose and undertaking he, said plaintiff, thereafter and prior to the 12th day of November, A. D. 1867, caused and procured to be fabricated
43 a certain instrument of writing in the form of a petition addressed to the probate court of the county of San Francisco, bearing no date, but purporting to be signed by Benjamin Hollingsworth, David Hollingsworth, and Edwin Hollingsworth, as petitioners, in the presence of Joe L. Bond and Wm. W. Pattison as attesting witnesses thereto, which instrument of writing stated, among other things and in substance, that the said petitioners, David Hollingsworth, Benjamin Hollingsworth, and Edwin Hollingsworth, were the only sons of George Hollingsworth, deceosed, and as such were entitled to administer upon the estate of said deceased; that the said George Hollingsworth, in the year A. D. 1850, removed from the county ot Monroe, in the State of Missouri, to the State of California; that on or about the —— day of November, A. D. 1855, he died intestate, being then a resident of the county of San Francisco, in the said State of California, and leaving estate therein consisting of a pre-emption claim and the improvements thereon, upon public lands of the United States, to wit: on lands then included in the southeast quarter of section number thirty-six (36), in township number two (2) south, of range number six (6) west; that the family of said deceased resided in said Monroe county at the date of said George Hollingsworth's removal to California, and still resided there, except said Benjamin Hollingsworth, who was then a resident of the State of Louisiana; that on the —— day of November, 1855, the family of said deceased consisted of
44 Elizabeth, wife of said deceased, and of David Hollingsworth, Benjamin Hollingsworth, and Edwin Hollingsworth, his only sons, and Virginia Hollingsworth, his only daughter; that on the —— day of May, A. D. 1857, the said Elizabeth, wife of the said deceased, died intestate; that David Hollingsworth was then of the age of twenty-nine (29) years, said Benjamin Hollingsworth ot the age of twenty-six (26) years, said Edwin Hollingsworth of the age of seventeen (17) years, and said Virginia Hollingsworth of the age of nineteen (19) years, and that the said Virginia was then a *femme sole*; that they, the said David Hollingsworth, Benjamin Hollingsworth, and Edwin Hollingsworth, did not desire to undertake to administer upon said estate, but that said William S. Chap-

man, a resident of said county of San Francisco, had consented to serve in that capacity, as appeared by his petition for letters of administration presented and filed therewith in said probate court, and that they therefore prayed the said probate court that said William S. Chapman be appointed in their stead administrator of the estate of said George Hollingsworth, deceased, and that at or about the same time he, the plaintiff, Chapman, likewise caused and procured to be fabricated and annexed to said petition, or pretended petition, a certain other instrument of writing, in the form of an affidavit, purporting so have been made and signed by Benjamin Hol-
45 lingsworth, and to have been by him sworn to on the 29th day of June, A. D. 1866, before Joseph D. Copeland, therein stated to be a notary public at Arcadia, in Bienville parish, in the State of Louisiana, in and by which affidavit, or supposed affidavit, the said or supposed Benjamin Hollingsworth is represented as deposing to and acknowledging his execution of said petition, or pretended petition, above mentioned; and that at or about the same time he, said Chapman, further caused and procured to be fabricated and prefixed to said petition, or pretended petition, a certain other instrument of writing, likewise in the form of an affidavit, headed: "In the probate court in and for the county of San Francisco, California. In the matter of the estate of George Hollingsworth," and purporting to have been made and signed by J. C. Kipper and Thomas Sanders, and have been by them sworn to on the 6th day of August, A. D. 1866, in the county of Monroe, in the State of Missouri, before Henry Davis, clerk of the circuit court in and for said county of Monroe, in and by which last mentioned affidavit, or supposed affidavit, the said or supposed Kipper and Sanders are represented as deposing and stating, among other things and in substance, that they reside at ——, in Monroe county, State of Missouri; that about the year A. D. 18—, or prior thereto, they became acquainted with the said George Hollingsworth and his family; that they had known said family ever since, and knew said George until his removal from said State of Missouri to said State of Cali-
46 fornia, to wit, about the year A. D. 1850, that on the —— day of ——, A. D. 1857, the said family of said George Hollingsworth consisted of his wife, Elizabeth, and his sons, David Hollingsworth, Benjamin Hollingsworth, and Edwin Hollingsworth, and his daughter, Virginia Hollingsworth; that said Elizabeth, wife of said George Hollingsworth, died intestate, on or about the —— day of May, A. D. 1857; that the said Virginia Hollingsworth was then unmarried; that the said children, except the said Benjamin Hollingsworth, were then living in said Monroe county, and were of the following ages, respectively, to wit: said David Hollingsworth, of the age of about 29 years; said Benjamin Hollingsworth, of the age of about 26 years; said Edwin Hollingsworth, of the age of about 17 years, and said Virginia Hollingsworth, of the age of about 19 years; that they, the said affiants, or supposed affiants, had read and knew the contents of a certain petition dated at Paris, Monroe county, Missouri, the —— day of ——, 1866, to the probate court in and for the county of San Francisco, in said State of California,

wherein it was stated said David Hollingsworth, Benjamin Hollingsworth, and Edwin Hollingsworth did not desire to undertake the administration of the estate of said George Hollingsworth, deceased, and contained the request that Wm. S. Chapman, a resident of San Francisco, in said State of California, may be appointed in their stead as administrator of the said estate; that
47 said petition was signed by said David Hollingsworth and said Benjamin Hollingsworth and said Edwin Hollingsworth, known to said affiants, or supposed affiants, to be the persons named in said petition as the petitioners thereof, and that said several petitioners, except the said Benjamin Hollingsworth in person, acknowledged to said affiants that they, said petitioners, had so signed the same for the purposes therein mentioned, and that said petitioners so signing the same were known to said affiants, or supposed affi ants, or supposed affiants, to be the identical persons named in said petition as the sons of said George Hollingsworth, deceased.

That in further execution of his said illegal and fraudulent purpose and undertakidg, he, said Wm. S. Chapman, on the 12th day of November, A. D. 1867, filed in the Probate Court of the said city and county of San Francisco, a petition signed and sworn to by him, wherein he, said Chapman, among other things and in substance, stated that George Hollingsworth died intestate, in the city and county of San Francisco, in said State, in the mounth of November, 1855, leaving estate in said county of San Francisco, consisting of a pre-emption claim of and to the lots of land thereinafter described and mentioned; that due search and inquiry had been made to ascertain if said deceased left any will and testament, but that none could be found, and that according to the best knowledge and belief of the said petitioner, Chapman, said deceased
48 died itestate; that the estate of the said deceased, so far as he could ascertain, was of the value of about five thousand seven hundred dollars, and consisted of a certain pre-emption right or claim and the improvements thereon, made by said deceased in his lifetime; that said claim was situated in the county of San Francisco, and consisted of the fractional southeast quarter of section number thirty-six (36), in township number two (2) south, of range number six (6) west, of the Mount Diablo meridian; that the said deceased died, leaving surviving him his widow, Elizabeth Hollingsworth, and four children, viz; three sons, David Hollingsworth, then aged thirty (30) years, Benjamin Hollingsworth, aged twenty-seven (27) years, and Edwin Hollingsworth, aged eighteen (18) years, and one daughter, Virginia Hollingsworth, aged twenty (20) years; that the said Elizabeth Hollingsworth, widow of the said deceased, died intestate, in Monroe county, in the State of Missouri, sometime in the month of May, in the year 1857, and that the only heirs of the said George Hollingsworth, deceased, then surviving, so far as known to the said petitioner, Chapman, were his said above mentioned children, who all then resided in Monroe county, in the said State of Missouri, with the exception of the said Benjamin Hollingsworth, who then resided in Bienville parish, in the State of Louisiana; that the said Benjamin Hollingsworth, David Hollingsworth and Edwin Hollingsworth,

the said children and heirs of the said deceased, did not desire
49 to undertake the administration of the said estate of said George Hollingsworth, deceased, and had requested of him, said petitioner, his consent to be appointed administrator of said estate; that he, said petitioner, consented to act as such administrator; and the said Chapman therein prayed that a day of court might be appointed for the hearing of his said petition, and that notice thereof should be given; and that upon such hearing, letters of administration upon the estate of the said George Hollingsworth might be granted and issued to him, said petitioner; and that in support of his, said Chapman's, petition and application for letters of administration upon the estate of the said George Hollingsworth, he, the said Chapman, on the same day, filed in said probate court said petition or pretended petition, and affidavits or pretended affidavits, so caused and procured by him to be fabricated, as above set forth. That such proceedings were thereafter had in said probate court; that upon the hearing of the said petition of the said Chapman, supported by the said fabricated petition and affidavits above mentioned, and by the testimony of the said Chapman, and other testimony adduced by him, and without any appearance of the said or supposed David Hollingsworth, Benjamin Hollingsworth, Edwin Hollingsworth or Virginia Hollingsworth, or the appointment or appearance of any attorney to represent them, or to represent any infant or absent heirs, if any such existed, an order of said
50 probate court was made and entered on the 26th day of November, A. D. 1867, appointing or purporting to appoint the said Wm. S. Chapman administrator of the estate or supposed estate of the said George Hollingsworth, deceased, and directing letters of administration to be issued by the clerk of said court, to him, said Chapman, upon his filing a bond in the sum of $1,000, approved by the judge of said court, and taking the oath prescribed by law for the faithful discharge according to law of his duties as such administrator.

That the said Chapman neglected thereafter to file any bond or to take or subscribe any oath as such administrator, until after the filing in the said United States Land Office at San Francisco, of the said plat of survey of said township number two (2) south of range number six (6) west Mount Diablo base and meridian as aforesaid, to wit, until the 7th day of April, A. D. 1868, when he, said Chapman, filed such bond, and thereafter on the 8th day of April, A. D. 1868, subscribed such oath and received such letters of administration.

That on the same day, to wit, said 8th day of April, A. D. 1868, under color or virtue, or supposed virtue, of said letters of administration, and in further prosecution of his said illegal and fraudulent purpose and undertaking, he, said Chapman, filed in the United States Land Office in and for the said district of San Francisco, a paper purporting to be a declaratory statement under the
51 pre-emption laws of the United States, and purporting to be made by him, said Chapman, as such administrator, wherein it was, among other things and in substance, stated that the said

George Hollingsworth had in his lifetime, and in the month of August, A. D. 1853, entered upon and improved said lots numbers four (4), five (5), and (6), in section number thirty-six (36), in township number two (2) south of range number six (6) west of the Mount Diablo meridian, claiming the same under the pre-emption laws of the United States, and that the said George Hollingsworth had thereafter resided thereon until his death, which took place in said city and county of San Francisco, in the month of November, A. D. 1855, and that he, said George Hollingsworth, had left him surviving several children then living, on behalf of whom said declaratory statement was filed.

In brackets, stricken out by 5th amend't; see fol. 183.

[That at the time of the filing of the said declaratory statement by the said Chapman as aforesaid, one Obadiah Livermore and one Justus Beplar set up and pretended to have some claim or claims to said lots four (4), five (5), and six (6), above mentioned, and that thereafter on or about the 18th day of August, A. D. 1868, the said Livermore, Beplar, and the said William S. Chapman appeared before the register and receiver of said United States Land Office in said district of San Francisco, and then and thereafter presented testimony in support of their respective claims, which testimony was reduced to writing and filed with said register and receiver.

52 That thereafter, and long after this, defendant had entered, settled, built a dwelling-house, and commenced to reside upon, said lots of land, and had tendered to said register, to be filed by him in said land office as a record thereof, his, this defendant's, declaratory statement giving notice of his said settlement upon, and of his claim to, said three lots of land under the pre-emption laws of the United States, and had tendered to said register his, said register's lawful fees for filing the same; and whilst this defendant was actually occupying, residing upon, cultivating, improving, and claiming said lots of land under and in accordance with the provisions of said pre-emption laws, and without any notice whatever at any time given to this defendant, or any opportunity offered or allowed him by said register and receiver, or by either of them, to present or make any proof of his, this defendant's, settlement and residence upon, improvements of, and right to said lots of land under said pre-emption laws, and after their refusal to allow him to make such proof, to wit: On or about the 2d day of September, A. D. 1869, the said register and receiver decided and declared that the said Obadiah Livermore, claiming said lots of land as a purchaser thereof from, and a locator thereof under and in the name and right of the State of California, was entitled to said lots of land, and that neither the said Beplar nor the said Chapman was entitled thereto.

53 That the said Chapman thereupon appealed from said decision of said register and receiver to the Commissioner of the General Land Office of the United States, and that without reading or making any examination of the testimony or papers

transmitted to him by said register and receiver on such appeal, or any yart thereof, said Commissioner, on the 27th day of May, 1870, signed a paper which decided said appeal in favor of the said Chapman.

That thereafter the said Livermore and Beplar respectively appealed from the said decision of the said Commissioner to the Secretary of the Department of the Interior of the United States, and that without reading or any examination of the testimony or papers filed upon such appeal, or any part thereof, he, said Secretary, on the 6th day of January, A. D. 1871, signed a paper which affirmed the decision of said Commissioner, and decided said appeal in favor of said Chapman.]

(Amendment of Jan. 17th, 1876, inserted here; see folio 218.)

That thereafter, to wit, on the 28th day of January, A. D. 1871, the said Wm. S. Chapman paid to the said receiver of said United States Land Office at San Francisco, the sum of one dollar and a quarter per acre for said lots of land, to wit, the sum of seventy dollars, or thereabouts, together with the fees of said register and receiver, and thereupon received from said register a certificate of purchase of said lots of land; and by means of such certificate of purchase, thereafter, to wit, on the —— day of ——, A. D. 1871, and prior to the commencement of this action, obtained
54 a patent for said three lots of land, issued in the name of the United States, and purporting to convey the title of the said United States in and to said lots [to him, said Chapman.] (Stricken out and insertion made by amend't of Jan. 17th, 1876; see fol. 223.)

And this defendant upon and in accordance with his information and belief, avers:

That in truth and fact the said George Hollingsworth never did, in his lifetime, settle, build a dwelling house, or reside upon, cultivate or improve said three lots of land, or any of them, or any part thereof; and that the said George Hollingsworth never, in his lifetime, acquired the rights of a pre-emptor, nor any right whatever in or to said lots of land, or any of them, or any part thereof, nor in his lifetime claimed the same, or any part thereof, under the pre-emption laws of the United States or otherwise, and that these facts were well known to the said Chapman at the time of his taking all the proceedings hereinbefore stated; that said land was not at any time during the lifetime of the said George Hollingsworth, subject to pre-emption, nor could any right thereto be acquired under or by virtue of the pre-emption laws of the Uuited States in any manner, nor by any person whatsoever; that the said George Hollingsworth had not and did not leave at the time of his death, any wife, children, or child, him surviving; that the said petition purporting to have been signed by Benjamin Hollingsworth, David Hollingsworth, and Edwin Hollingsworth, as petitioners therein, and
55 by Joe L. Bond and Wm. W. Pattison, as attesting witnesses thereto, and the said affidavit thereto annexed, purporting to

have been signed and sworn to by Benjamin Hollingsworth, and the certificate thereto of such signature and swearing, purporting to have been signed by Joseph D. Copeland, a notary public at Arcadia, Bienville parish, in the State of Louisiana, and the other affidavits prefixed to said last mentioned petition, purporting to have been signed and sworn to by J. C. Kipper and Thomas Sanders, and the certificate thereto of such signature, and swearing purporting to have been signed by Henry Davis, clerk of the circuit court, in and for the county of Monroe, in the State of Missouri, were not in fact, nor was any of them ever signed and sworn to by any such person or persons as they respectfully purport to have been signed and to have been sworn to by; and that the said Chapman well knew said above recited facts, but caused and procured said petition and several affidavits and certificates to be fabricated and filed the same with his, said Chapman's, own petition, in said probate court, as before stated, in order that he might by means thereof obtain from said probate court letters of administration upon the supposed and pretended estate of the said George Hollingsworth, deceased, and that he, said Chapman petitioned for and obtained such letters of administration; filed in said United States Land Office at San Francisco said declaratory statement, presented before said register and receiver of
56 said land office, testimony in support of said pretended preemption claim set up by him, said Chapman, in the name of the said George Hollingsworth, deceased, [and thereafter prosecuted said claim before the Commissioner of the General Land Office, and before the Secretary of the Department of the Interior of the United States,] (stricken out by 6th amend't; see fol. 184,) and procured and obtained said patent for said three parcels of land as above stated and shown, not in good faith, nor for the purpose of actually administering according to law upon the estate, or upon any estate in fact, left by the said George Hollingsworth, nor for the benefit of any creditors, heirs, or distributees of the said George Hollingsworth, but solely for the purpose of obtaining from the United States, fraudulently and contrary to the laws thereof, their title to said three lots of land, for the sole use aud benefit and private gain of him, the said Chapman; that the said Chapman had not at the time of the commencement of this action, nor has he now any right or title whatsoever in or to said lots of land, or any of them, or any part thereof, except that so, as aforesaid, fraudulently acquired and obtained by him under and by means of said proceedings and said patent; that the said Chapman was not at the time of his taking any of the said proceedings, or doing or causing to be done any of said acts hereinbefore stated, qualified according to law to pre-empt or to become a purchaser by pre-emption
57 of any public land of the United States, and that consequently, and for the other reasons herein set forth and shown, all the acts and proceedings of the said Chapman resulted in the obtaining from the said United States the said patent for said land, have been in fraud of the rights of the defendant thereto, as hereinbefore stated and set forth, and that consequently he, the said Chapman, ought

by this honorable court to be held and adjudged a trustee of the legal title of said land, to and for the use and benefit of this defendant, and ought by this court be compelled to convey to this defendant such legal title, absolutely or upon such terms and on such conditions as to this court shall seem just and according to the rules and principles of equity, which terms and conditions, if any shall be so imposed, this defendant hereby offers to perform.

Wherefore, this defendant prays that by the judgment and decree of this honorable court, herein to be made and rendered, said plaintiff, Wm. S. Chapman, be adjudged and declared to be a trustee of the legal title of said lots of land mentioned and described in said Chapman's complaint herein for this defendant, his heirs, and assigns, and adjudged and declared to hold said legal title to and for the use and benefit of this defendant, his heirs, and assigns; and that by such judgment and decree, and by the enforcement thereof, according to law and equity, the said Chapman be compelled unconditionally, or upon the performance of such terms as this court shall impose, to
58 convey to this defendant, his heirs and assigns, such legal title, free and clear of and from all lien or incumbrance thereon whatsoever, and that in case the said Chapman should from any case fail or neglect so to do, that this court appoint and empower a commissioner to execute, acknowledge, and deliver such conveyance, in the name of the said Chapman, to this defendant, his heirs and assigns, and thereby to pass such legal title to this defendant, his heirs or assigns; and that the said Chapman, and all persons claiming, or to hereafter claim, said lots, or any of them, or any part thereof, by, through, or under him, by title or claim derived since the filing of this cross-complaint, and the filing in the office of the recorder of said city and county of a notice of the pendency thereof, be forever enjoined and prohibited from setting up said patent of the United States or the legal title to said lots thereby acquired, or in any manner, or for any purpose, using the same against this defendant, his heirs or assigns, or against any person lawfully claiming said lots, or any of them, or any part thereof, by, through, or under this defendant, his heirs or assigns; and that this defendant recover of said plaintiff his, this defendant's, necessary costs and disbursements herein expended and to be expended, and have such further and other relief in the premises as he shall need, and as shall be agreeable to equity and good conscience.

JAMES B. TOWNSEND AND
B. B. NEWMAN,
Att'ys for Defendant.

59 [Duly verified by Thomas Quinn, and filed November 16th, 1872.]

Demurrer.

[Title of Court and Cause.]

The plaintiff in the above-entitled action, demurs to the third defence in the answer of the defendant, in said action set forth and

contained, on the ground that the same does not state facts sufficient to constitute a defence in said action to the complaint of the plaintiff therein.

Said plaintiff also demurs to the cross-complaint of the defendant in said action, on the ground that the same does not state facts sufficient to constitute a cause of action against said plaintiff in favor of said defendant, nor facts sufficient to entitle said defendant to any affirmative relief in said action against the said plaintiff.

WRIGHT & NOURSE,
Attorneys for Plaintiff.

Duly filed and served December 6th, 1872.

Order Sustaining Demurrer.

[Title of Court and Cause.]

The demurrer to the cross-complaint herein was this day sustained by the court, with leave to defendant ten days to amend his answer herein.

Dated September 26th, 1873.

60 *Amendment to Answer and Cross Complaint.*

[Title of Court and Cause.]

The said defendant, by leave of the court, hereby amends his answer and cross complaint heretofore filed herein as follows, to wit:

1st. By inserting therein, at the end of the 19th line, of the 7th page thereof, the following words and figures, to wit:

That the whole of section number thirty-six (36,) of said township number two (2) south, range number six (6) west, Mount Diablo base and meridian, with the exception only of said three fractional lots, numbered respectively four (4,) five (5) and six (6,) mentioned in said complaint, amounting to only fifty-six acres and seven one-hundredths of an acre of land was, has been, and is taken and covered by and included within the final surveys of the finally confirmed Mexican private land claims, respectively known as "Laguna de la Merced" and "San Miguel," and that in consequence of the whole of said section, with said small exceptions, being so taken, covered, and included, and lost to said State of California as school land, said State has, and had prior to the settlement of this defendant upon said fractional lots in said complaint mentioned, taken, selected and received, other public land of the United States, situated in the district of San Francisco, in lieu of the whole of said thirty-sixth (36th) section, which lieu selections have, and had
61 prior to such settlement, by this defendant, been approved, and the land so selected certified over to said State by the United States and the proper authorities thereof, whereby the title to said lieu selections of lands became, was and still is, vested in said State or in its assignees as school land, in lieu of the whole of said thirty-sixth (36th) section, and the said fractional lots number four (4,) five (5) and six (6,) became, ever since have been, and still are, public land of the United States, subject to the pre-emption laws thereof.

2d. By striking therefrom all that portion thereof, commencing with the words "That at the time of the filing of the said declaratory statement," etc., on the 5th line of the 38th page thereof, and extending to and including the words "decided said appeal in favor of the said Chapman," on the 1st line of the 42d page thereof.

3d. By striking therefrom, in the 16th, 17th, 18th, 19th, 20th, 21st, and 22d lines of the 46th page thereof, the words following, to wit:

"And thereafter prosecuted said claim before the Commissioner of the General Land Office, and before the Secretary of the Interior of the United States."

4th. By inserting therein, as the end of the 29th line of the 55th page thereof, the words and figures following, to wit:

That the whole section number thirty-six (36) of said township number two (2) south, Range number six (6) west, Mount Diablo base and meridian, with the exception only of said three fractional lots numbered, respectively, four (4), five (5), and six (6), mentioned in said complaint, amounting to only fifty-six acres and seven one-hundredths of an acre of land was, has been, and is taken and covered by and included within the final surveys of the finally confirmed Mexican private land claims respectively known as "Laguna de la Merced" and "San Miguel," and that in consequence of the whole of said section, with said small exception, being so taken, covered, and included and lost to said State of California as school land, said State has, and had prior to the settlement of this defendant upon said fractional lots, in said complaint mentioned, taken, selected and received other public land of the United States, situated in the District of San Francisco, in lieu of the whole of said thirty-sixth (36th) section, which lieu selections have, and had, prior to such settlement by this defendant, been approved, and the land so selected certified over to said State by the United States and the proper authorities thereof, whereby the title to said lieu selections of land became, was, and still is vested in said State or in its assignees, as school land, in lieu of the whole of said thirty-sixth (36th) section, and the said fractional lots number four (4), five (5) and six (6), became, ever since has been, and still are public lands of the United States subject to the pre-emption laws thereof."

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5th. By striking therefrom all that portion thereof commencing with the words "That at the time of the filing of the said declaratory statement," etc., on the 1st line of the 90th page thereof, and extending to, and including the words "decided said appeal in favor of the said Chapman," on the 18th and 19th lines of the 93d page thereof,

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6th. By striking therefrom, in the 3d, 4th, 5th, 6th, 7th and 8th lines of the 98th page thereof, the words following, to wit: "And thereafter prosecuted said claim before the Commissioner of the General Land Office, and before the Secretary of the Interior of the United States."

JAMES B. TOWNSEND AND
B. B. NEWMAN,
Att'ys for Defendant.

[Duly verified by Thomas Quinn on 22d day of October, 1873' and filed October 22d, 1873.]

Demurrer to Amended Answer and Cross-Complaint.

[Title of Court and Cause.]

The plaintiff in the above entitled action demurs to the third defence in the answer of defendant, as amended, on the ground that It appears upon the face of said third defence that the same does not state facts sufficient to constitute a cause of action.

Said plaintiff demurs to the amended cross-complaint in
64 said action, on the ground that the same does not state facts sufficient to constitute a cause of action.

GEO. A. NOURSE,
Attorney for Plaintiff.

Nov. 11th, 1873.
Duly served and filed November 11th, 1873.

Order Overruling Plaintiff's Demurrer to Defendant's Amended Answer and Amended Cross Complaint.

[Title of Court and Cause.]

The demurrer to the amended answer and cross complaint heretofore submitted was this day overruled by the court.
[Duly certified.] Dated April 11th, 1874.

Answer to Cross Complaint.

[Title of Court and Cause.]

And now comes the plaintiff in the above-entitled action, and for answer to the amended cross complaint of the defendant therein, on his information and belief, denies that the tract of land in said cross complaint first mentioned and described, as claimed by Josefa De Haro and others in their petition in said cross complaint mentioned, covered or included the lots or parcels, or any or either of them, or any part thereof, in the complaint in this action mentioned and described.

And denies that the tract of land in said cross complaint
65 mentioned and described, as claimed by Josefa De Haro and others, or any part of the land in said complaint in this action described, was, at any time after the month of June, A. D. 1853, reserved from sale or excepted from the operation of the pre-emption laws of the United States.

And says that by the act of Congress, approved March 3, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," the lots or parcels of land in said complaint mentioned became and were in the month of June, 1853, subject to sale under the pre-emption laws of the United States of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein; and that said statute authorized the sale

and disposition, under the said pre-emption laws, of the land in said complaint described, from and after some time in the month of June, A. D. 1853, and says that the location of the half league of land in said cross complaint mentioned, for which the grant therein mentioned was fully confirmed, was, in the month of June, A. D. 1853, ascertained and determined not to include any portion of the land in the complaint herein described.

Said plaintiff, further answering said cross complaint, says that a lawful plat of a lawful survey of township (2) south, in range (6) west, from the Mount Diablo meridian, which included the lots of land in the complaint described, was made and approved by
66 the U. S. surveyor general for California on or about the sixteenth day of October, A. D. 1863, and on said day was filed in the U. S. land office at San Francisco.

This plaintiff denies that the State of California has taken, selected, or received other public lands of the United States in lieu of the whole of said section thirty-six (36), in consequence of the whole of said section, with the exception of the lots mentioned in said complaint, being taken, covered, or included in the Mexican grants in said cross complaint mentioned, or lost to the State by reason of said grants.

And this plaintiff says that said lots in said complaint mentioned were lost to the said State as school land, solely because and by reason of the settlement made on said lots by George Hollingsworth in said cross complaint mentioned.

This plaintiff, further answering said cross complaint, denies that the defendant herein ever took possession of, or entered upon, the lots of land in said cross complaint mentioned, or either of them, or any part thereof, under or by authority, permission, license or invitation of any law of the United States; and denies that at the time of said defendant's alleged entry upon said lots and taking possession thereof said lots of land, or any or either of them, or any part thereof, were unappropriated.

Said plaintiff further admits that said register refused to receive or file the said alleged declaratory statement of said defendant, but denies that he did so wrongfully.
67 And admits that the Commissioner of the General Land Office of the United States refused to instruct said register as requested by said defendant, or to grant said defendant relief, and admits that said Commissioner affirmed the said decision of said register, but denies that he did so either wrongfully or in violation of defendant's rights.

And admits that the Secretary of the Interior refused to instruct the said Commissioner to instruct the said register to receive or file said defendant's declaratory statement, or to grant him the other relief in said cross complaint specified, and refused to grant to said defendant any relief in the premises, but denies that he did so wrongfully or illegally, or that he refused to grant him any relief to which he was by law entitled.

Said plaintiff, further answering said cross complaint, denies that he ever formed the purpose, or undertook to obtain from the United

States, for his own use or benefit, the title of the United States to said three parcels of land, or any part thereof, and denies that he ever formed the purpose, or undertook to procure said title for himself, or for any other person, either fraudulently or contrary to the laws of the United States, or by false testimony, or under or by means of any false pretense whatever.

And denies that he ever fabricated, or caused or procured to be fabricated, the instrument in writing, in the form of a petition in the cross complaint mentioned, or any instrument whatever.

68 And denies that he ever fabricated, or caused or procured to be fabricated, the instrument in said cross-complaint mentioned therein, alleged to be in the form of an affidavit, and purporting to be made, signed, and sworn to by one Benjamin Hollingsworth.

And denies that he, the said plaintiff, ever fabricated, or caused or procured to be fabricated, the writing in said cross-complaint mentioned, and therein alleged to be likewise in the form of an affidavit, and to be headed "In the probate court in and for the county of San Francisco, California. In the matter of the estate of George Hollingsworth," and to purport to have been made and signed by J. C. Kipper and Thomas Sanders, and to have been by them sworn to.

And denies that he filed in the probate court of the city and county of San Francisco any petition or other instrument in execution of any illegal or fraudulent purpose or undertaking.

Said plaintiff further says that long before said defendant entered or settled upon or took possession of said land in said complaint described, or any part thereof, to wit, on the fourth day of August, 1868, the heirs of George Hollingsworth, by their attorneys, appeared before the register and receiver of the United States land office at San Francisco, according to notice previously given to all persons appearing by the records of said land office to claim said land, or any part thereof, under the laws of the United

69 States, and offered proof in support of the claim of said heirs to enter said land; that the taking of testimony in their behalf was by said register and receiver postponed to the 19th day of said month of August, for the convenience of attorneys for a rival claimant to enter said land, and that on the 19th and 20th days of said month the testimony on behalf of said heirs was taken before said register and receiver; that thereafter, during divers days, up to and including the 19th day of November, A. D. 1868, testimony on behalf of Justus Bepler, who then and there claimed to enter said land as a pre-emptor, and of the State of California claiming said land under a grant from the United States, and also rebutting testimony offered in behalf of said heirs of George Hollingsworth, was duly taken before said register and receiver, and on said last-named day the taking of testimony in said case was closed up by order of said officers.

That afterwards said case was re-opened for the taking of further testimony on behalf of the State of California, by direction of the Commissioner of the General Land Office, as this plaintiff is in-

formed and believes, and that at divers days and times after said case was so reopened testimony was offered before said officers in behalf of said State and in behalf of said heirs in rebuttal thereof; and that on the second day of September, A. D. 1869, at which time this plaintiff had not, nor had the heirs of George Hollingsworth, or any of them, any knowledge of any claim of said
70 defendant to enter said land, nor even that there was living any such man as said defendant, the taking of testimony in said case was finally closed by order of said register and receiver.

This plaintiff, on his information and belief, denies that at said trial or hearing of said contest before said register and receiver he, the said plaintiff, produced any testimony before said officers to the effect that the lots of land in said complaint mentioned were, during the time of George Hollingsworth's residence thereon, or at any time, subject to pre-emption under any pre-emption laws, but says, on his information and belief, that all the testimony offered on that point before said officers was offered by, and in behalf of the State of California and one O. Livermore, claiming under said State.

And denies that any false testimony was offered by him, the said plaintiff, or by any person or persons before said officers in support of the claim of said heirs of George Hollingsworth to enter said land.

And denies that said register or receiver or Commissioner of the General Land Office or Secretary of the Interior was deceived or imposed upon by any false testimony in behalf of said heirs, or offered or submitted by this plaintiff; and denies that said register was induced to refuse to file said defendant's declaratory statement, or to refuse to allow him to prove up and perfect his right
71 and claim to said land by means of or by reason of any false testimony whatever; and denies that said Commissioner or Secretary was induced or did refuse to instruct said register to file said defendant's declaratory statement, or to allow him to prove up and perfect his right or claim to said land, or to pay for or obtain a United States patent for said land, by any false testimony whatever.

And denies that said lots of land were awarded to Benjamin, David, Edwin, or Virginia Hollingsworth, as heirs of George Hollingsworth, deceased, by reason of any false testimony whatever.

This plaintiff further says that said George Hollingsworth did in his lifetime, to wit, in the fall of the year 1853, settle, build a house and reside upon, and did cultivate and improve the said lots of land mentioned in the complaint.

That said George Hollingsworth did acquire the right to enter the said lots of land under the pre-emption laws of the United States, and did claim the same under said laws.

That said land was subject to pre-emption when said George Hollingsworth entered and settled thereon, and at the date of his death.

That said George Hollingsworth had, and did leave surviving, at the time of his death, a wife and four children.

That the petition in said cross complaint described, purporting to have been signed by Benjamin Hollingsworth, David Hollingsworth, and Edwin Hollingsworth, as petitioners therein, and
72 by Joe L. Bond and Wm. W. Pattison as attesting witnesses thereto, and the affidavit thereto annexed in said cross complaint mentioned, purporting to have been signed and sworn to by Benjamin Hollingsworth, and the certificate thereto of such signature and swearing, purporting to have been signed by Joseph D. Copeland, a notary public; and the other affidavit in said cross complaint mentioned and described, purporting to have been signed and sworn to by J. C. Kipper and Thomas Sanders, and the certificate thereto of such signature and swearing, purporting to have been signed by Henry Davis, clerk of the circuit court in and for the county of Monroe, in the State of Missouri, were, and each of them was, signed and sworn to by the persons by whom they purported respectively to have been signed and sworn to.

This plaintiff denies that he, the said plaintiff, caused or procured the said petition, or said affidavits, or either of them, or said certificates, or either of them, to be fabricated.

Said plaintiff further says that he petitioned for letters of administration upon the estate of George Hollingsworth, deceased; filed in the U. S. Land Office the declaratory statement in said cross complaint mentioned as filed by him, and procured to be presented in said Land Office testimony in support of the claim of the heirs of George Hollingsworth to enter said land by pre-emption, and procured and obtained a United States patent for said land to
73 issue to said heirs of George Hollingsworth, in good faith and for the benefit of the heirs of said Hollingsworth; and denies that he did said acts, or any or either of them, for the purpose of obtaining fraudulently, or contrary to any laws, the title of the United States to said land, or to any part thereof, or of obtaining such title for the sole use or benefit or private gain of said plaintiff.

That he, the said plaintiff, was, at the commencement of this action, and ever since has been and still is, the owner in fee simple absolute of one undivided half of said lots of land.

Said plaintiff denies that any act or proceeding of his, resulting in obtaining from the United States a patent for said land, has been or is in fraud of any right or rights of defendants, and says that he ought not to be held or adjudged a trustee of the legal title of said land to or for the use of defendant, or of any person whatever, and ought not to be compelled to convey said land, or any interest therein, or part thereof, to said defendant or any other person.

Wherefore this plaintiff prays judgment according to the prayer of the complaint in said action.

GEO. A. NOURSE, *Att'y for Plaintiff.*

[Duly verified by plaintiff, Wm. S. Chapman, and filed by order of court January 31st, A. D. 1876, *nunc pro tunc* as of January 17th, A. D. 1876.

THOS. A. REYNOLDS, *Clerk.*
By BERT McNULTY, *Deputy.*]

74 *Order Allowing Amendment to Answer and Cross Complaint.*

[Title of Court and Cause.]

On motion of defendant's counsel, it is ordered that said defendant be, and hereby is, allowed to amend his answer and cross complaint, by consent of attorney for plaintiff, and said were thereupon filed by the clerk.

[Duly certified as an order upon the minutes of the court, dated January 17th, 1876.]

Defendant's Amendment to the Third Defence of his Answer and to his Cross Complaint.

[Title of Court and Cause.]

The said defendant, by leave of the court, and consent of plaintiff, hereby amends the 3d defence of his answer herein, and likewise his cross complaint herein, by inserting on the 38th page, at the end of the 5th line of said 3d defence, and on the 90th page, at the end of the 1st line of said cross complaint respectively, the words and figures following, to wit:

"That according to the information and belief of this defendant, subsequent to the filing by said Chapman of the declaratory statement aforesaid, to wit, after this defendant had entered, settled, built a dwelling house and commenced to reside upon, and whilst he was residing upon said lots of land, claiming the same under said United States pre-emption laws, and after he had tendered to said register his, said defendant's, said declaratory
75 statement, to be filed in said United States Land Office, at San Francisco, as aforesaid, he, said plaintiff, without any notice thereof to this defendant, or any appearance or contest by him, produced testimony before said register and receiver, to the effect that the said George Hollingsworth did in his lifetime, and in or about the month of August, 1853, settle, build a dwelling-house upon, cultivate and improve said lots 4, 5, and 6, under the pre-emption laws of the United States, and did thenceforth and thereafter reside thereon, claiming the same under said pre-emption laws down to the time of his death, in December, 1854, and that said lots were during all of that time subject to pre-emption, under said pre-emption laws, and that he, said Hollingsworth, thereby acquired, and at the time of his death possessed and held a right of pre-emption in and to said lots, under said pre-emption laws, whereas in truth and fact said testimony was false, and was known by said Chapman to be so; and that said register and receiver, and said commissioner of the general land office, and said Secretary of the Interior, were deceived and imposed upon by said false testimony, and said register was thereby induced to, and did refuse to, file this defendant's declaratory statement, and to allow him to prove up and perfect his right and claim to said land, and said commissioner and secretary were thereby induced to, and did refuse to instruct and cause said register to file this defendant's said
76 declaratory statement, and to allow him to prove up and

perfect his right and claim to said land, under said pre-emption laws, and to pay for and obtain a United States patent for the same, but on the contrary awarded said lots of land to the said Benjamin Hollingsworth, David Hollingsworth, Edwin Hollingsworth, and Virginia Hollingsworth, as heirs of the said George Hollingsworth, deceased.

Also, by striking out of the 28th line of the 42d page of said 3d defence, and out of the 16th line of the 94th page of said crost-complaint respectively, the words, "to him, said Chapman," and inserting as follows, to wit: "To them, said Benjamin Hollingsworth, David Hollingsworth, Edwin Hollingsworth, and Virginia Hollingsworth, as heirs of said George Hollingsworth, deceased, and that subsequently to the payment for said land by Chapman as aforesaid, and prior to the issuance of said United States patent, to wit, on or about the 1st day of May, 1871, the said plaintiff procured to be executed to him a deed, in the names of the said Benjamin, David, Edwin, and Virginia, purporting to convey to him, said plaintiff, the undivided one-half of their, said Benjamin, Edwin, and Virginia's right, title, interest, and claim in and to said lots, under and solely by virtue of which last mentioned deed said plaintiff seeks and claims to recover said lots in this action.

JAMES B. TOWNSEND AND
B. N. NEWMAN,
Attorneys for Defendant.

JANUARY 13, 1876.

77 [Duly verified by Thomas Quinn. Served January 13th, 1876, and filed January 17th, 1876.]

Findings.

[Title of Court and Cause.]

This case came on for trial before the court above named, Honorable E. D. Wheeler, judge of the said court, presiding, at the December term, 1875, of said court, to wit, on the twelfth day of January, A. D. 1876, a trial of jury being expressly waived by both parties, plaintiff and defendant. The plaintiff appeared at said trial by George A. Nourse, his attorney, and the defendant by B. B. Newman and J. B. Townsend, his attorneys, and after hearing the testimony offered by and on behalf of said parties respectively, and the argument of counsel, the court makes the following:

Findings of Fact.

First. The tract of land mentioned and described in the cross-complaint as claimed by Josefa De Haro and others, under the Mexican grant in said cross-complaint mentioned, and as being the land described in their petition for confirmation of said grant, never did cover or include the lots or parcels of land in the complaint in this action described, nor any or either of them, nor any part thereof.

Second. Said tract of land in the complaint described was
78 never, at any time after June, 1853, excepted from the operation of the pre-emption laws of the United States.

Third. A lawful plat of a lawful survey of township two (2) south, range six (6) west, from the Mount Diablo meridian, was made and approved by the United States surveyor general for the State of California, on the sixteenth day of October, A. D. 1863, and a certified copy was, on the same day, filed in the United States land office at San Francisco, but was soon afterwards withdrawn, and on the 19th day of March, A. D. 1868, an amended plat of said township was made under authority of said United States surveyor general and approved by him, and a copy thereof was filed in said United States Land Office, on both which plats the land described in said complaint is shown and represented as surveyed public land of the United States.

Fourth. The State of California never acquired any title to the land described in said complaint, or to any part thereof.

Fifth. The State of California has selected other land in lieu of the whole of the section thirty-six, in said complaint mentioned, and the land so selected has been listed over to said State, but the land in said complaint mentioned was not listed to said State, nor was other land selected in lieu thereof in consequence of the remainder of said section 36 being covered by the Mexican grants in the cross complaint mentioned.

79 *Sixth.* The defendant Thomas Quinn did not take possession of or enter upon the lots of land in the complaint mentioned, or either of them, or any part thereof, under or by authority, permission, license or invitation of any law of the United States.

Seventh. At the time of defendant's entry upon the land in the complaint mentioned said land was not actually occupied by any one.

Eighth. The plaintiff never formed the purpose or undertook to obtain from the United States, for his own use and benefit, the title of the United States to the land in the complaint described, or to any part thereof, and never formed the purpose or undertook to procure said title, for himself or for any person, either fraudulently or contrary to the laws of the United States, or by false testimony, or under or by means of any false pretences.

Ninth. Said plaintiff did not fabricate, or cause to procure to be fabricated, the instrument in writing in the form of a petition, mentioned and described in the cross complaint.

Tenth. Said plaintiff did not fabricate, or cause to procure to be fabricated, the instrument in said cross complaint mentioned and described, and therein alleged to be in the form of an affidavit, and to purport to be signed and sworn to by one Benjamin Hollingsworth.

Eleventh. Said plaintiff did not fabricate, or cause or procure to be fabricated, the instrument in said cross complaint mentioned, and therein alleged to be likewise in the form of an affidavit,

80 and to be headed "In the probate court in and for the county of San Francisco, California, in the matter of the estate of George Hollingsworth," and to purport to have been made and signed by J. C. Kipper and Thomas Sanders, and to have been by them signed and sworn to.

Twelfth. Said plaintiff filed in said probate court his petition for letters of administration on the estate of George Hollingsworth in said cross complaint mentioned, but not in execution of any illegal or fraudulent purpose or undertaking.

Thirteenth. The register and receiver of the United States Land Office at San Francisco, before defendant's entry on the land in dispute had begun to take testimony in relation to the right of the heirs of George Hollingsworth to enter by pre-emption the land described in the complaint, in a contest then pending in said land office between said heirs of George Hollingsworth and one Justus Bepler, also claiming to pre-empt said land, and the State of California.

Fourteenth. At the time when the defendant went upon the demanded premises as set forth in the cross complaint, he had the personal qualifications required of a pre-emptor by the United States pre-emption statutes.

Fifteenth. No false testimony was offered at said hearing before said register and receiver in support of the claim of said heirs of George Hollingsworth to enter said land by prremption.

81 *Sixteenth.* Said register and receiver were not, nor was either of them deceived or imposed upon by any false testimony in said matter, nor by any false testimony induced to refuse to file defendant's declaratory statement, or to refuse to allow him to prove up or to perfect his right or claim to said land.

Seventeenth. Neither the Commissioner of the United States General Land Office, nor the Secretary of the Interior was by any false testimony induced to refuse to instruct said register to file defendant's declaratory statement, or to refuse to instruct said register to allow defendant to prove up or perfect his right or claim to the land described in the complaint, or to award said land to Benjamin Hollingsworth, David Hollingsworth, Edwin Hollingsworth or Virginia Hollingsworth, as heirs of George Hollingsworth, deceased.

Eighteenth. George Hollingsworth did, in the fall of 1853, settle, build a house, and reside upon, and did inhabit and improve the lots in said complaint mentioned, and did cultivate a portion thereof, and did claim the same under the United States pre-emption laws, and did acquire the right to enter the same under said laws.

Nineteenth. Said lands was subject to pre-emption under the laws of the United States when George Hollingsworth so entered and settled thereon, and at the date of his death.

Twentieth. Said George Hollingsworth died intestate in California in the year 1854, and left him surviving a wife and four children, said children being named respectively Benjamin, David,

82 Virginia, and Edwin, and his said widow died intestate in the year 1857. On the 20th day of May, A. D. 1872, a patent for the parcels of land described in said complaint was duly issued from the United States of America to "the heirs of George Hollingsworth as patentees; and said children of George Hollingsworth, by deed of grant, bargain and sale, dated May 1st, 1871, conveyed to the plaintiff before the commencement of this action,

one undivided half of the lots 4, 5, and 6 in the complaint described."

Twenty-one. The petition in the said cross complaint, described as purporting to have been signed by Benjamin Hollingsworth, David Hollingsworth, and Edwin Hollingsworth as petitioners therein, and by Joe L. Bond and Wm. W. Pattison as attesting witnesses thereto, was signed by said Benjamin, David, and Edwin Hollingsworth as petitioners, and by said Joe L. Bond and Wm. W. Pattison as witnesses.

Twenty-two. The affidavit annexed to said petition, purporting to be signed and sworn to by Benjamin Hollingsworth, was signed and sworn to by him, and the certificate affixed thereto of such signing and swearing, purporting to be signed by Joseph D. Copeland, a notary public, were signed and sworn to by said Copeland as such notary public.

Twenty-three. The other affidavit in such cross-complaint mentioned and described, purporting to have been signed and
83 sworn to by J. C. Kipper and Thomas Sanders, was signed and sworn to by said Kipper and said Saunders, and the certificate thereto of such signature and swearing, purporting to have been signed by Henry Davis, clerk of the circuit court in and for the county of Monroe, in the State of Missouri, was signed by said Davis as such clerk.

Twenty-four. Said plaintiff did not fabricate, or cause or procure to be fabricated, said petition or said certificate, or either of them, but each of them was signed and sworn to by the person by whom it purports to be signed and sworn to.

Twenty-five. The plaintiff did not petition for or obtain letters of administration upon the estate of George Hollingsworth, or file in the United States Land Office the declaratory statement in said cross complaint mentioned as filed by him, or present before said register and receiver testimony in support of the pre-emption claim of the heirs of George Hollingsworth, or procure or obtain the United States patent in said cross complaint mentioned for the purpose of obtaining from the United States, for his own benefit, or private gain, or fraudulently or contrary to the laws thereof, the title to the lots of land in said complaint mentioned, but in good faith to secure to said heirs the title to said land.

Twenty-six. No act of said plaintiff resulting in the obtaining from the United States said patent for the said land has been, or is, in fraud of the rights of the defendant.

84 *Twenty-seven.* Said plaintiff was at the commencement of this action, has ever since been, and still is, the owner and seized in fee of one undivided half of the lots of land in said complaint mentioned.

Twenty-eight. Said defendant was at the commencement of this action, and still is, in possession of the lots of land, and all of them, in said complaint described, and at the commencement of this action withheld, and still withholds, possession thereof from said plaintiff.

Wherefore, I find as

Conclusions of Law.

First. Said defendant has, and had at the commencement of this action, no right or title, legal or equitable, to the land described in the complaint or any part thereof.

Second. That the plaintiff was at the commencement of this action, and is now, entitled to recover from defendant the possession of the land described in the complaint.

Let judgment be entered accordingly.

E. D. WHEELER, *Judge.*

December 29, 1876.

[Duly filed December 30th, 1876.]

Decree.

[Title of Court and Cause.]

The above-entitled action came on to be tried upon the
85 issues of fact made by the pleadings therein at the December term, 1875, of the court above named, to wit, on the 12th day of January, A. D. 1876, before the court above named, Hon. E. D. Wheeler, judge of said court, presiding, a jury trial being expressly waived by both parties to said action, and said plaintiff appearing by George A. Nourse, his attorney, and the defendant appearing by his attorneys, B. B. Newman and J. B. Townsend. And now, after hearing the evidence offered by both parties to said action, and the arguments of the respective counsel, the findings of fact and conclusions of law of said court being filed in said action, it is thereupon ordered, adjudged, and decreed that the defendant take nothing by his cross complaint, and that the same be dismissed; and that the plaintiff receive of and from said defendant the possession of the pieces or parcels of land described in the complaint in this action, the same being lots four (4) and five (5) and six (6) in section thirty-six (36), in township two (2) south, range six (6) west from the Monte Diable base and meridian, according to the United States Government survey; and that he recover of and from said defendant the costs of this suit, taxed at — dollars in U. S. gold coin.

Dec. 29, 1876.

E. D. WHEELER, *Judge.*

Decree recorded January 20th, 1877. [C. 195.]

[Endorsed:] No. 437. Filed January 20, A. D. 1877. Thomas H. Reynolds, clerk, by W. H. Reed, dep. clerk.

86 *Notice of Motion for a New Trial.*

[Title of court and cause.]

The above-named plaintiff will take notice that the above-named defendant intends to move for a new trial of said action, and that such motion will be made upon the grounds following, to wit:

1st. Irregularity in the proceedings of the court and adverse

party, and orders of the court, and abuse of its discretion by which said defendant was prevented from having a fair trial.

2d. Accident and surprise which ordinary prudence could not have guarded against.

3d. Insufficiency of the evidence to justify the decision of the court, and that it is against law.

4th. Errors in law which occurred at said trial and were excepted to by said defendant.

And that said motion will be made upon a statement of the case to be prepared and settled by the court.

Dated at San Francisco, this 23d day of January, 1877.

JAMES B. TOWNSEND AND
B. B. NEWMAN,
Att'ys for Def't.

Duly served and filed January 23d, 1877.

Engrossed Statement on Motion for a New Trial.

[Title of court and cause.]

The trial of this action commenced on January 12th, 1876, before the court without a jury, a jury having by the parties thereto
87 been waived, the plaintiff appearing by George A. Nourse, Esq., and the defendant by B. B. Newman and James B. Townsend, Esqs., his attorneys.

Thereupon the plaintiff, to maintain said action on his part, offered and gave in evidence the following-mentioned documents, to wit:

1st. A patent dated May 20th, 1872, purporting to have been issued by the United States for the land in dispute, which patent is in the words and figures following, to wit:

The United States of America.—Certificate No. 3106.

To all to whom these presents shall come, greeting:

Whereas, William S. Chapman, administrator of the estate of George Hollingsworth, deceased, of San Francisco county, California, has deposited in the General Land Office of the United States a certificate of the register of the land office at San Francisco, California, whereby it appears that full payment has been made by the said William S. Chapman, administrator, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of the public lands," for the lots numbered four, five, and six, of section thirty-six, in township two south, of range six west, in the district of land subject to sale at San Francisco, California, containing fifty-six acres and seven one hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land
88 Office by the surveyor general, which said tract has been purchased by the said William S. Chapman, administrator.

Now know ye, that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted and by these presents do give and grant unto the heirs of the said

George Hollingsworth, deceased, and to their heirs, the said tract above described.

To have and to hold the same together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the heirs of the said George Hollingsworth, deceased, and to their heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of a proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twentieth day of May, in the year of our Lord one thousand eight hun-
89 dred and seventy-two, and of the Independence of the United States the ninety-sixth.

By the President—

U. S. GRANT,
By H. PARISH, *Secretary.*

[SEAL.]

C. B. BOYNTON,
Recorder of the General Land Office.

Recorded, Vol. 6, page 48.

[Endorsed:] Letters Patent. United States to Wm. S. Chapman. Dated —.

2d. A plat of the United States survey of township 2 south, of range 6 west, Mount Diablo base and meridian, filed in the United States land office at San Francisco, on October 17th, 1863, which plat is as follows, to wit:

(Here follows map marked page 89[1].)

3d. An amended plat of the United States survey of same township, filed in same land office on March 19th, 1868, which plat is as follow, to wit:

(Here follows map marked page 89[2].)

Plaintiff further offered: An entry in book kept in the United States land office at San Francisco, of lands selected by the State of California, in lieu of the 16th and 36th sections of school land lost by said State, which entry is in the words and figures following, to wit: Lots one and two in section 26, in township
90 26 south, of range 12 east, of the Mount Diablo meridian, selected by the State of California, in lieu of fractional south-

east quarter of section 36, in township two south, of range 6 west, of the Mount Diablo meridian.

To the admission of which in evidence said defendant objected on the grounds following, to wit:

1st. That said entry was not competent, nor any proof that the land so selected had ever become the property of said State.

2d. That lists of all State indemnity selections, which have been approved and certified over to the State by the Secretary of the Interior, are sent from the General Land Office to the U. S. land office at San Francisco, and deposited and kept therein, which are the best and only competent evidence of what lands have become the property of the State under such selections, and in lieu of what lands they have received by the State.

3d. That no title passes to the State by any mere selection, but only by the approval of such selection by the Secretary of the Interior, and the listing of the land selected to the State.

4th. That said entry does not prove, nor tend to prove, what the plaintiff says he offers it to prove.

The court overruled said objections and admitted said entry in evidence, to which ruling said defendant then and there excepted.

Plaintiff then called as a witness on his behalf C. H. Chamberlain, who testified that he was then the receive of the U. S.
91 land office at San Francisco; that the before mentioned book was made up from the applications filed by the State in said land office, such entries being made in said book within a few days after the filing of the applications; that the plat of survey of township 2 S. of R. 6 W., which was filed in October 17th, 1863, has written on it the word "suspended," without date or signature thereto, but I think that said word is in the handwriting of Mr. Swift, who was formerly register of said U. S. land office. He became register of said land office, and first entered on its duties in 1864 or 1865, I think 1864. Witness is shown by plaintiff a map or diagram marked "Exhibit A," and says: The triangular piece of land represented thereon marked "George Hollingsworth," purports to be the same land as Lots 4, 5, and six, as represented on said official plat which was filed in said U. S. land — March 19, 1868; said "Exhibit A" is a copy of the diagram which was in the original testimony filed before said register and receiver in the contested case of George Hollingsworth's heirs against Justus Beplar and the State of California.

Said "Exhibit A" is as follows, to wit:

(Here follows map marked page 90.)

On cross-examination said witness stated: I do not think that the State selections shown in the entries in said book as having been made in lieu of that portion of the southeast ¼ of sec. 36,
92 twp. 2 S., of R. 6 W., have ever been listed over to the State of California by the Secretary of the Interior. The whole amount of land selected included in said entry in said book is $148\frac{6}{100}$ acres, only $103\frac{93}{100}$ acres of which is taken on account of the

land lost by the State in the SE. ¼ of sec. 36, township 2 S., of R. 6 W., the balance being made up of land lost elsewhere.

Plaintiffs then offered in evidence a deed dated May 1st, 1871, purporting to have been executed by David Hollingsworth, Benjamin Hollingsworth, Edward Hollingsworth, Virginia Jones, late Virginia Hollingsworth, and George W. Jones, her husband, to William S. Chapman, and purporting to convey to said Chapman, his heirs and assigns, the one undivided half part of lots 4, 5, and 6, mentioned in the complaint herein, and purporting to have been acknowledged by said grantors and to have been recorded in the office of the county recorder of the city and county of San Francisco, on November 4th, 1873, in liber 722 of deeds, at page 211.

To the admission of which deed in evidence said defendant objected, on the grounds that the said deed was immaterial and conveyed nothing to said plaintiff, it appearing that no patent had then been issued to said David Hollingsworth and others by the United States, and that the legal title to said land would only pass by such patent.

The court overruled said objection, to which ruling said defendant then and there excepted.

93 Thereupon said plaintiff rested his case.

It was thereupon admitted and conceded by the parties to this action that the title to the land in dispute in this action never vested in the State of California.

Thereupon the Court adjourned until 10 o'clock a. m. of the following day.

On January 13th, 1876, at 10 o'clock a. m., the trial of said action was resumed.

Thereupon said defendant offered to give in evidence the original record in the case of Josefa De Haro and others against the United States, being docket number 380 of the U. S. district court for the State of California, said case having been commenced before the U. S. Commission appointed, and which sat under the act of Congress approved March 3d, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and said defendant offered to prove by said record that the said Josefa De Haro and others filed their petition and claim before said board of land commissioners, on the 16th day of March, 1852, claiming certain lands therein described by metes and bounds, courses and distances, claiming the same under a grant from the former Mexican government, made September 27th, 1835, of said tract of land, under the name of "Laguna de la Merced," and to prove thereby that said tract of land was confirmed to said Josefa De Haro and others

94 by said board of land commissioners, on the 24th day of July, 1855, and thereafter on appeal to said U. S. district court, duly prosecuted, was by said court confirmed to said Josefa de Haro and others, on January 13th, 1858, and that on the filing of the written statement of the U. S. Attorney General that the appeal from said decree of said district court would not be prosecuted by said United States, the said appeal was, by said district

court, on March 19th, 1858, dismissed, and the decree of said district court made final, and said claimants allowed to proceed thereon as upon final decree in their favor; and that proceedings were thereafter taken according to law for the survey and segregation of the land so confirmed to said Josefa De Haro and others, but that such segregation never was made till January 10th, 1868, when a plat of survey of said Mexican grant so confirmed, and known as the "Laguna de la Merced," was by decree of said U. S. district court finally confirmed, by which survey the land now in dispute in this action was first excluded from the land so confirmed to Josefa pe Haro and others; and said defendant offered to prove by competent testimony that the land now in dispute in this action was always included in and a part of the said claim of Joseph D. Haro and others, as originally made in their said petition filed before said board of land commissioners, and as confirmed by said land commissioners and by said district court, and as existing down to January 10th,
95 1868, when by final segregation said three fractions in dispute, lots four, five, and six, were excluded from said Mexican grant, "Laguna de la Merced," so confirmed to said Josefa de Haro and others.

To the admission of which record and testimony said plaintiff objected on the grounds following, to wit:

First. That said defendant cannot attack the U. S. patent given in evidence by said plaintiff at all.

Second. That it does not lie in defendant's mouth to say that the land now in dispute was not open to pre-emption at the time the said George Hollingsworth is alleged to have settled thereon.

Thereupon said parties to this action admitted, for the purposes of this action, that the defendant herein has possessed the qualifications to pre-empt, and occupied the status toward said land which are set out in his third defence and cross complaint herein.

Thereupon the admissibility of said evidence was argued by said counsel, pending which argument the court adjourned until 10 o'clock a. m. of Monday, January 17th, 1876.

On Monday, January 17th, 1876, the argument on the admissibility of said evidence was resumed and continued, and thereafter said court adjourned until 10 o'clock a. m. of January 18th, 1876.

On January 18th, 1876, arguments of counsel on the admissibility of said evidence was continued, whereupon said court adjourned until 10 o'clock a. m. of Monday, January 24th, 1876.

96 On Monday, January 24th, 1876, the trial of said cause being resumed, said defendant in reply to a question by the court, stated that defendant's offer of said evidence was made for the purpose of showing that the land now in dispute was reserved from the acquisition of any pre-emption rights thereon, from March 16th, 1852, down to the time when the survey of said ranch "Laguna de la Merced" was finally approved by the U. S, district court, at which time the land now in dispute was for the first time excluded from the said ranch; and for the purpose of showing that the land now in dispute was included in the tract described in said petition and claim of Josefa De Haro and others, down to the time of the

approval of the final survey of said tract finally confirmed to said Josefa De Haro and others; and that said confirmations of said tract claimed by said Josefa De Haro and others, were confirmations of the whole tract claimed by them, until by said final survey it was ascertained that there was more than half a league included in the tract so claimed and until the surplus over such half league was by said final survey excluded from the land so confirmed.

Said plaintiff's counsel thereupon stated that plaintiff's objections to said evidence, were: *First.* That the question of fact whether or not the land now in dispute was subject to pre-emption at the time Geore Hollingsworth made his settlement upon it, has
97 been disposed of as a question of fact by the register and receiver of U. S. Land Office at San Francisco, and by the Commissioner of the General Land Office and Secretary of the Interior. *Second.* The complaint does not allege that any error of law was made by said land officer, or any of them, in their decisions, preliminary to the issuing the patent now in evidence. *Third.* That there is no evidence upon the point of the alleged fraud and imposition claimed to have been practiced upon said register and receiver, commissioner and secretary, and claimed to have influenced them in their said decision. *Fourth.* That it does not appear that any evidence whatever upon that point was offered by said Chapman or the heirs of said George Hollingsworth, before said register and receiver.

Thereupon the court sustained the objections of said plaintiff to said evidence so offered by said defendant, and rejected the same, and refused to allow the same to be given.

Third exception.—To which ruling and refusal the defendant then and there excepted.

Defendant then offered to give in evidence the original letter or decision of the Commissioner of the General Land Office, dated May 27th, 1870, addressed to the register and receiver of the U. S. Land Office at San Francisco, and on file and one of the records of said land office at San Francisco in the contested case of the heirs of George Hollingsworth against Justus Bepler and the State
98 of California, for the three parcels of land in dispute in this action, in which decision said commissioner recites the facts in support of the claim of said heirs of George Hollingsworth which he considers as proved by the evidence and testimony introduced in support thereof by the said William S. Chapman, and in which said commissioners upon said recited facts so found by him to be proved, decided said case in favor of said heirs of George Hollinsworth.

To the admission of which document in evidence said plaintiff objected, on the grounds that the same is irrelevant and not pertinent to anything in the pleadings herein.

The court overruled said objections, and said document was thereupon read in evidence by said defendant, and is hereinafter inserted at length.

Thereupon it was by the parties to this action admitted that said George Hollingsworth died intestate in the year 1854.

Thereupon said defendant called as a witness one C. H. Chamber-

lain, who testified that he is the receiver of the U. S. land office at San Francisco, and that the book now produced by him is a docket of contested cases before said register and receiver, and that said book is kept in said land office by said register and receiver and is a record of said office, and that said book was brought from said office by said witness, and that said book contains docket entries of the contest between the heirs of George Hollingsworth, de-
99 ceased, and Justus Bepler and the State of California, for the land in dispute in this present action, and that said docket entries correctly state the dates of the several steps taken in said contest, and of the facts which accrued therein, although there might be other things accruing in said case which said register and receiver did not consider it necessary to enter therein.

On cross-examination said witness stated that said record was correct as far as it goes; that it was a statement of all the proceedings in said contest that were necessary for the guidance of said register and receiver; that there was an appeal by said State of California from the decision of said register and receiver to the Commissioner of the General Land Office; that said contest was commenced before said register and receiver on August 18th, 1868, and finally closed before said register and receiver on July 28th, 1869; that during said period of time said case was once stated to be closed, but afterwards reopened for the admission of further evidence, and was not finally closed until said July 28th, 1869.

Thereupon said defendant offered to read from said record book the docket entries of said contest between said heirs of said George Hollingsworth and said Bepler and the State of California, and the same were thereupon, without objection, read in evidence, and are in the words and figures following, to wit:

100 HEIRS OF GEORGE HOLLINGSWORTH, dec'd
vs.
JUSTUS BEPLER and STATE OF CALIFORNIA.

Geo. A. Nourse, att'y for the heirs of Hollingsworth; C. Wittram, att'y for Bepler; E. O. F. Hastings, att'y for the State.

Aug. 18, 1868, case commenced.

July 24, 1869, case closed.

Mar. 5, 1870, case forwarded.

Mar. 27, 1870, case decided by the Commissioner in favor of the heirs of Hollingsworth.

June 9, 1870, parties notified allowing thirty days for appeal.

June 18, 1870, notice of appeal filed by Leander Ransom on behalf of the State.

July 12, 1870, appeal forwarded.

Jan'y 12, 1871, Com'r notified local office of Secretary's decision.

January 28th, 1871, land entered by Hollingsworth.

Thereupon said witness, C. H. Chamberlain, further testified that said defendant Quinn was not notified of said contest before said register and receiver, nor of the giving or taking of any testimony

before said register and receiver by said Chapman on behalf of the heirs of George Hollingsworth, and that said Quinn was not a party to said contest, nor to any of the proceeding taken
101 therein, and that said Quinn did not appear nor give any evidence of his said Quinn's claim to said land during said contest, nor would he have been allowed to do so, because no declaratory statement for said land was then on file by said Quinn; that said Quinn offered to file such declaratory statement shortly after his settlement upon said land, but that said register and receiver, under what they then considered the practice of the U. S. Land Department, but which is not the practice of said department at the present time, refused to file said Quinn's declaratory statement, on the ground that contest between other parties for said land had already commenced; that said Quinn appealed from the said register and receiver's refusal to file his declaratory statement, to the Commissioner of the General Land Office; that the ruling of the department has been, that when either party to such contest shows a good right to land, he takes such land without the rights of a third party claiming it under an alleged right having its commencement subsequent to the incipiency of the claims which are being litigated, being affected or examined into at all; that such third party is not allowed, in such case, to have a contest at all with such contesting parties, or with the successful one of them, before said register and receiver, unless the Commissioner should reopen the case and order a rehearing between such third party and other claimants of
102 such land; that said Quinn never did in fact file a declaratory statement for the land in dispute in this action, for the sole reason that said register and receiver, Commissioner and Secretary, would not allow him to do so.

Defendant then offered in evidence an original letter, dated March 18th, 1870, from the Commissioner of the U. S. General Land Office to the register and receiver at San Francisco, in reference to the offer of Thomas Quinn to file a declaratory statement.

To which evidence said plaintiff objected, as irrelevant and immaterial, but the court admitted said evidence, and the same was read, and is in the words and figures following, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March 18th*, 1870.

REGISTER and RECEIVER, *San Francisco, Cal.*

GENTLEMEN: Messrs. Lane and Newman, of San Francisco, have filed in this office five affidavits in support of the application of Thomas Quinn to file his D. S. upon lots 4, 5, and 6, SE. 4 sec. 36, T. 2 S., R. 6 W., which application has been rejected by you, as stated by the gentlemen above named. Our records show that said tracts were selected Nov. 7, 1863, for seminaries under the 1st section of the act of March 3d, 1853, per list 9, and that subsequently, under date of April 8, 1868, Wm. S. Chapman was allowed to file a D. S. for the heirs of George Hollingsworth, alleging a settlement August 3, 1853.

103 In view of the facts that said selection has not been pat-

ented, and the filing in favor of said heirs was allowed, please advise this office of the status of said tracts, as shown by your records, with your reasons for rejecting the application of Mr. Quinn to file, and in your letter refer to this as "G" by its date.

Very respectfully, JOS. S. WILSON, *Commissioner.*

Defendant then offered in evidence an original letter, dated April 29th, 1870, from the Commissioner of the U. S. General Land Office to Messrs. Lane and Newman, said letter being in reference to the application of said Quinn to file a declaratory statement for said land, and being in the words and figures following, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April 29th*, 1870.

Messrs. LANE & NEWMAN, *San Francisco, Cal.*

GENTLEMEN: Referring to my letter to you of the 18th ult., I have now to state that the action of the land officers at San Francisco, in refusing the application of Thomas Quinn to file his D. S. upon lots 4, 5, and 6, sec. 36, T. 2 S., R. 6 W., is affirmed by this office, for the reason that the title to said tracts was in dispute before the local office between the heirs of George Hollingsworth, deceased, Justus Bepler, and the State of California, at the date of said application.

Very respectfully, JOS. S. WILSON, *Commissioner.*

104 Fourth Exception. To the admission of which in evidence said plaintiff objected, on the ground that the same immaterial and incompetent, and the court sustained said objection and refused to receive said letter in evidence, to which refusual said defendant then and there excepted.

Said defendant then offered in evidence an original letter, dated April 29th, 1870, from the Commissioner of the General Land Office to the register and receiver at San Francisco, in reference to the said Quinn's application to file a declaratory statement upon the land in dispute in this action.

To the admission of which in evidence said plaintiff objected, on the ground that the same was irrelevant and immaterial, but the court overruled said objections, and said letter was thereupon read in evidence, and is in the words and figures following, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April 29th*, 1870.

REGISTER and RECEIVER, *San Francisco, Cal.:*

GENTLEMEN: In reply to your letter of the 15th inst., stating that you had rejected the application of Thomas Quinn to file his D. S. upon lots 4, 5 and 6, sec. 36, T. 2 S., R. 6 W., for the reason that the tracts were involved in the contested case of the heirs of George Hollinsworth *vs.* Justus Bepler and the State of California, I have now to inform you that your action is affirmed by this
105 office, and the attorneys for Quinn have been so advised.

Very respectfully, J. S. WILSON, *Commissioner.*

Defendant then offered in evidence an original letter or decision by said Commissioner of the General Land Office, dated May 27th, 1870, addressed to said register and receiver at San Francisco, in relation to the contested case of George Hollinsworth's heirs against Bepler and the State of California, also the original letter or decision therein referred to, of July 5th, 1865, in the case of Charlotte McCurdy against Freeman Parker.

To the admission of which said plaintiff objected, as immaterial and irrelevant and incompetent; but the court overruled said objections, and said letters or decisions were thereupon read, and are respectively in the words and figures following, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *May 27th*, 1870.

REGISTER and RECEIVER, *San Francisco, California.:*

GENTLEMEN: This office has examined the case of the heirs of George Hollingsworth *vs.* Justus Bepler and State of California, involving the right to lots 4, 5 and 6, of sec. 36, T. 2 S., R. 6 W., M. D. M., 56.07 acres.

Section lines run Oct. 9, 1863. Township plat filed Oct.
106 17, 1863. Suspended July 19, and Feb. 23d, 1867. Amended plat filed March 19, 1868. Released from suspension, Oct. 19, 1868.

The records show that Wm. S. Chapman, administrator of Geo. Hollingsworth, April 8, 1868, filed D. S. 4328 on lots 4, 5, and 6 of section 36, T. 2 S., R. 6 W., alleging settlement (by Geo. Hollingsworth) August 3d, 1853.

Justus Bepler, Nov. 19, 1863, filed D. S. 1578 on lots 4 and 5 of sec. 36, T. 2 S., R. 6 W., alleging settlement Feb. 19, 1863.

State of California Nov. 7, 1863, filed application No. 17 for lots 4, 5, and 6, sec. 36, T. 2 S., R. 6 W., for seminary purposes. Sec. 12, act March 3, 1853.

The diagram attached to the report of the testimony and made part thereof, shows that the tract in contest constitutes a piece of land of triangular form situated between the ranchos "Laguna de la Merced" and "San Miguel;" said tracts appear to have been at one time within the claimed limits of the "Rancho Laguna de la Merced," which was confirmed, as shown by our records by the Supreme Court of the United States, January 15th, 1866. The decision of this court affirmed the decree of the United States district court of California, of June 18th, 1862, which established the boundaries of the "Rancho de la Merced" according to the "Ransom survey," made in July, 1853.

Hearing of case commenced Aug. 18, 1868, and closed Sept. 2,
1869. Parties present at the several dates of taking testi-
107 mony and elaborate arguments of counsel for the respective parties are attached to the report of the case.

The testimony submitted, which is voluminous and minute beyond precedent, shows affirmatively and reliably that George Hollingsworth, in his lifetime, settled on the land in contest in the summer or fall of 1853, before the Government survey, and subsequent

to the Ransom survey in July, 1853, which fixed the boundaries of the "Rancho Laguna de la Merced," erected a house thereon, furnished the same, and resided therein, making it his home from November, 1853, until a few weeks previous to his death, which occurred in December, 1864, at San Francisco, California, to which place he was taken for medical treatment.

After his death, as shown by four witnesses, his body was taken to the land upon which he formerly resided and claimed as a preemptor, and there interred, not far from the place where his house then stood. Declarations of said George Hollingsworth are given in evidence of his purpose to pre-empt 160 acres of land, and to bring his family there, who then resided in the State of Missouri, to said land. At the time of his death his family consisted of a wife and four children.

The wife died shortly after the death of her husband in Missouri, where children still reside, the eldest son being at the time of hearing 26 years of age. All were minors at the death of the said George Hollingsworth. It is also shown that decedent cultivated a portion of said land, and the same was inclosed by the fencing of himself and brother, and other adjoining owners or claimants. By agreement there was no division fence between him and his brother, B. S. Hollingsworth, who resided upon and claimed the N. ½ of the N. E. ¼ of sec. 1, T. 3 S., R. 6 W. The decedent, as shown, was at the date of his alleged settlement a citizen of the United States and head of a family. The filing of said Chapman for said heirs, to whom letters of administration on the estate of George Hollingsworth were granted by the probate court of San Francisco county, California, April 8th, 1868, was made in less than a month after the filing of the amended plat of March 19, 1868, and is therefore in time.

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Justus Bepler, as shown by his own testimony, resided on land owned by him, on what he terms "Visitacion Rancho," and that he removed from thence in February, 1863, to the tracts in contest, erected a house thereon, slept in it with his family 50 or 60 nights, moved back to the land owned by him, where he continued to reside at the times of hearing, and that said house was suffered to go to waste. He is shown to be a citizen of the United States, head of a family, and his filing is in time.

O. Livermore is the claimant under the State of California. Pending a contest for determining the rights of persons claiming under a Mexican or Spanish grant, the lands claimed therein are, in general, formally withdrawn from pre-emption until the contest is terminated. Settlements, however, made thereon prior to the final adjudication of such grants are not rendered abortive, and in case the grants or parts thereof claiming to cover lands upon which settlements are made are declared invalid by the Supreme Court of the United States, the rights of the settlers are protected by virtue of the provisions of the act of March 3d, 1853, entitled "An act to extend," etc., and are also recognized by the ruling of the Department proper, March 8, 1870, in the case of Cooper *vs.* State of California, said Cooper claiming land adjoining

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the tracts in contest. George Hollingsworth being personally qualified as a pre-emptor, and having settled upon the land in dispute in sec. 36 prior to the survey, and prior also to the final adjudication of the rights of the grant claimants, and having deceased before consummating his pre-emption claim, duly initiated under the act of March 3d, 1853, entitled "An act to provide for the survey of the public lands," etc., sec. 6, his administrator is authorized to complete the same by virtue of the act of March 3d, 1843, in the name of "the heirs."

The points ruled by the decision of this office of July 5th, 1865, cited by you as governing your decision adverse to the heirs of Geo. Hollingsworth, were simply the status of the land under the act of Sept. 4th, 1841, and not under the act of March 3d, 1853, and that McCurdy was personally disqualified as to citizenship as a pre-emptor in his lifetime, and hence no right attached in his heirs to complete an invalid pre-emption.

110 That and the present decision are not in conflict.

Your decision rejecting the claim of the heirs of Geo. Hollingsworth as filed by the administrator, Wm. S. Chapman, and awarding the tracts in contest to the State of California, is overruled, and the same rejecting the claim of Justus Bepler is affirmed.

You will notify the parties of this decision, and allow thirty days from the time of service of notice of appeal.

The party appealing must specify the errors alleged in the decision.

In your further report please refer to this as "G," by its date.

Very respectfully, JOS. S. WILSON,
Commissioner.

[Endorsed:] General Land Office, May 27, 1870. Heirs of Geo. Hollingsworth *vs.* Justus Bepler *et al.* Award to the heirs, thirty days to appeal. Parties notified June 9. Filed June 9, 1870.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *July* 5, 1865.

REGISTER AND RECEIVER, *San Francisco, California.*

GENTLEMEN: The pre-emption case contested between Charlotte McCurdy and Freeman Parker has been examined. The considerations which appear below lead this office to reverse your decision directing a joint entry, and to declare Parker's the better right to

111 the whole tract claimed by him. Charlotte McCurdy claims S. W. S. E. and S. E. S. W., sub. 2, and N. E. N. W. and N. E. N. W., sec. 11, 4 N., 7 W. Freeman Parker claims S. W. ¼ and N. E. ¼ and N. W. ¼ of N. E. ¼, N. W. ¼ sec. 11, 4 N., 7 W. N. E. N. W. and N. W. N. E. 11 is the tract in dispute. Mrs. McCurdy filed Oct. 10, 1864, alleging settlement Feb'y 14, 1852. Freeman Parker filed Nov. 14, 1864, alleging settlement January 15, 1853.

Reception of Plat Oct. 3d, 1864.

Parker's personal qualifications proved. Mrs. McCurdy filed

declaration of intention to become a citizen of the U. S. Dec. 10th, 1864. Other personal qualifications not disputed, and inferred *sub mode*. In 1851 John McCurdy and one Vandernoodt, each in his own right, made settlements under which these parties respectively claim. In 1853 Vandernoodt sold to claimant Parker. In 1861, John McCurdy dying, left his widow on his first settlement. When McCurdy and Vandernoodt first went on to the land they agreed to a division line between their settlements, and with a slight deflection made in 1854, to accomodate McCurdy, that line remained the boundary of actual use and occupation to the time of hearing. It allowed to McCurdy only a small portion of the tract in dispute, and it allowed to Parker an equal quantity of the land now claimed without contest by McCurdy. See accompanying diagram on
112 which the first division line is named, and the line fenced in 1854, and used as a boundary thereafter, appearing in green and yellow, which colors respectively mark the actual possession of Parker and McCurdy to the time of hearing. Accuracy of diagram testified to, and diagram admitted without objection. Five or six acres is the extent of any actual cultivation, occupation, or control exercised by the McCurdy's over the tract in dispute. McCurdy's house was and is on section 2. Parker's on the disputed tract. Parker, beside the house, built valuable fences on the disputed tract; in particular the division fence between the two settlements. No valuable improvements of Mrs. McCurdy are on the disputed tract, except a few rods of fence running northerly from the western terminus of said division fence, and with the latter completing her enclosure. To give to Mrs. McCurdy a joint entry (supposed equal) of the tract in dispute, will be to take from Parker six acres of sub. 2, which he has possessed from the first, and thirty-four like acres of section 11; in other words, to diminish the area of his actual settlement by forty acres. On the other hand, to give the whole tract in dispute to Parker, will result simply in taking from Mrs. McCurdy six acres of section 11, which have been under her use and occupation, and in giving to her as equivalent, six acres of sect. 2, which Parker has hitherto used and occupied.

To effect this state of facts, an asserton of a claim by John McCurdy to the tract in dispute is proved. But the assertion
113 itself rests mainly in words consisting in assertion to a witness in serving notices on Vandernoodt and Parker, and in bringing of suits before local tribunals, which latter resulted in decisions against his claim. The original agreement is not disproved nor even denied, nor the actual possession in accordance with it. And this, both settlements being of even date, entitles Parker to the tract in dispute, by virtue of the location and extent of his setment on the principles of justice. In 1861, the land in question being then claimed under a foreign grant, was not open to pre-emption, act Mar. 3, 1853, sec. 1, vol. 1, ch. 245, page 246. April, 1863, appears to have been the time when it was released from this claim, and thus opened to pre-emption, act March 3, 1853, section 1, vol. 10, page 244, ch. 144. At the time of his death, then, in 1861, John McCurdy had not become "a party entitled to the benefit

of the pre-emption laws," as a settler upon this land. Circular, Sept. 15, 1841. "Third" qualification letters, L. S., page 362. Therefore his heirs could take no right under him by virtue of the act of March 3, 1843, sec. 2, vol. 5, chap. 86, page 620.

Charlotte, the contestant, could not commence a pre-emption for herself until Dec. 10th, 1864, when she made a declaration of her intention to become a citizen of the United States. The heirs did nothing as individual pre-emptors, and Charlotte, the widow, did nothing for them. Parker, then, is entitled to take the tract
114 in dispute, because there is no contestant in the case against him legally qualified to dispute his claim. You will give both parties due notice of this decision, and of the time, thirty day, allowed them in which to enter an appeal. If at the expiration of that time no appeal shall have been taken, you will then allow Parker to complete his pre-emption of N. E. ¼, N. W. ¼, and N. W. ¼, and N. E. ¼, and S. W. ¼ of N. E. ¼ 11, 4 N. 7 W.

Mrs. McCurdy will be required to file a new declaration before she can be allowed to enter the land claimed by her, without dispute, viz., S. W. ¼, S. E. ¼, and S. E. ¼, S. W. ¼, sec. 24, N. 7 W.

Respectfully yours, J. M. EDMUNDS,
Commissioner.

Defendant then offered in evidence an original letter dated June 30th, 1870, by Joseph S. Wilson, Commissioner of the General Land Office, to Messrs. Lane and Newman, attorneys for said Quinn, in reference to the application of said Quinn to file a declaratory statement upon the land now in dispute, which letter is in the words and figures as follows, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *June 30th*, 1870.

Messrs. LANE and NEWMAN, *San Francisco, Cal.*

GENTLEMEN: Your communication of 17th inst., addressed to Hon. J. D. Cox, Secretary of the Interior, has been referred to this office by the department, and I have now to advise you that
115 all papers connected with the application of Thomas Quinn to file for lots 4, 5, 6, sec. 36, 2 S., 6 W., San Francisco district, have this day been submitted to the Hon. Secretary for final action. When returned you shall be promptly advised of the action of the department.

Respectfully, J. S. WILSON,
Commissioner.

To the admissions of which in evidence said *said* plaintiff objected as incompetent, and the court sustained said objection and rejected said letter, to which ruling said defendant then and there excepted.

It was admitted by the parties to this action that said Lane and Newman were the attorneys of said Quinn in the matter of his application to file a declaratory statement upon land now in dispute.

Defendant then offered in evidence an original letter, dated January 12th, 1871, from the Commissioner of the General Land Office to the register and receiver at San Francisco, enclosing a copy of the decision of C. Delano, Secretary of the Interior, dated January 6th, 1871, upon the contested case of George Hollingsworth's heirs against Justus Bepler and the State of California, to the admission of which in evidence said plaintiff objected, on the ground that the same was irrelevant, but the court overruled said objection and admitted said letter and said copy of decision in evidence, and the same were thereupon read in evidence, and are respect-

116 ively in the words and figures following, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Jan. 12th*, 1871.

REGISTER AND RECEIVER, *San Francisco, California.*

GETLEMEN: Referring to our letter of 22d September last, you are now advised that under date of 6th inst., the Hon. Secretary of the Interior returned the papers in the case of heirs of George Hollingsworth *vs.* Justus Bepler and State of California, involving the right to enter lots 4, 5, and 6, sec. 36, T. 2 S., R. 6 W., and affirmed our decision dated 27th May, 1870. (See copy of Secretary's decision herewith.)

You will please notify the parties in interest of the above, and carry out our decision by permitting the heirs of Hollinsworth to enter the above described tracts. Mr. Bepler's D. S., 1578, covering same tracts, has this day been noted on our records as cancelled.

Respectfully,

JOS. S. WILSON,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *6th Jan.*, '71.

SIR: I affirm your decision, and herewith return the papers transmitted with your report of 11th July last, in the case of the heirs of Gerge Hollingsworth *vs.* Justus Bepler and the State of California, involving the right to enter lots 4, 5, and 6, sec. 36, T. 2 S., R. 6 W., San Francisco, California.

I am, sir, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

117 Hon. Jos. S. Wilson, Commissioner General Land Office.

GENERAL LAND OFFICE, *January 12th*, 1871.

Heirs of George Hollingsworth *vs.* State of California *et als.*—Commissioner affirmed.

Parties notified. Filed January 25, 1871.

Defendant then offered in evidence an original letter, dated January 23, 1871, from the Commissioner of the General Land Office to the register and receiver at San Francisco, enclosing a copy of the decision of the Secretary of the Interior upon the application of said Quinn to file a declaratory statement, upon the land now in dispute; which letter, with said enclosed decision, were thereupon read in

evidence, and are respectively in the words and figures following, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Jan'y 23d*, 1871.

REGISTER AND RECEIVER, *San Francisco, California.*

GENTLEMEN: Referring to our decision of 29th April last, in the case of Thomas Quinn's application to file for lots 4, 5, and 6, Sec. 36, T. 2 S., 6 W., which we rejected, you are now advised that the Hon. Secretary of the Interior, under date of 17th inst., returned the papers and affirmed our decision. Please notify the parties in interest accordingly. A copy of the Secretary's decision is herewith enclosed, also, of 22d October, 1870, case of J. C. Ralston.

Respectfully, JOS. S. WILSON,
Commissioner.

118 DEPARTMEMT OF THE INTERIOR,
WASHINGTON, D. C., *Jan'y 16th*, 1871.

SIR: I have received your letter of the 30th June last, transmitting the appeal of Thomas Quinn from you decision, affiming that of the local offices at San Francisco, Cal'a, refusing him leave to file for a certain tract of land on the ground that it was, at the time of his application, involved in the contested case of the heirs of Geo. Hollingsworth *vs.* Justus Bepler and the State of California. The principle involved in the case was discussed at some length by my predecessor in his letter to your office, under date of the 22d Oct. last. The pending contest has since been determined by the decision of the department in favor of Hollingsworth's heirs. The right of Quinn who sought to file during the pendency of that case was foreclosed by that decision. This was the view of the case taken by Mr. Secretary Cox, and applying it to the present instance it does not appear that any practical object can be secured by disturbing your action and that of the local officers. The papers are herewith returned.

Very respectfully your obedient servant,
C. DELANO,
Secretary.

The Commissioner of the General Land Office.

Defendant then offered in evidence the following original papers,
documents, and orders, all brought from the probate court
119 of the city and county of San Francisco, and now on file and
of record therein, being case numbered 2747 of said probate court in the matter of the estate of George Hollingsworth, deceased, consisting of the petition of William S. Chapman, of San Francisco, addressed to said probate court, asking that letters of administration be granted to him upon the estate of George Hollingsworth, deceased, said petition being dated and having been filed on Novembea 12, 1867; also, a paper purporting to be an affidavit of J. C. Kipper and Thomas Sanders; also, a paper purporting to be the petition of Benjamin Hollingsworth, David Hollingsworth, and Edwin Hollingsworth, requesting the appointment of said Chapman

as administrator of said estate of George Hollingsworth, deceased, together with an affidavit of said Benjamin Hollingsworth thereto annexed, said last mentioned affidavit, petition and affidavit having been filed in said probate court on said 12th day of November, 1867, in the matter of the estate of George Hollingsworth, deceased; also, an order of said probate court, dated and filed on November 26th, 1867, appointing said Chapman administrator of said estate of George Hollingsworth, deceased; also, a bond of said Chapman as such administrator, dated December 5th, 1867, and filed in said probate court in the matter of the estate of George Hollingsworth, deceased, on April 7th, 1868; also, letters of administration issued by said probate court to said W. S. Chapman upon said es-
120 tate of George Hollingsworth, deceased, dated April 8th, 1868, and filed in said probate court on the same day, which petition of said Chapman, affidavit of said Kipper and Sanders, petition of said Benjamin Hollingsworth and others, affidavit of said Benjamin Hollingsworth, order of said probate court, bonds of said Chapman, and letters of administration to him upon said estate were thereupon read in evidence without objection, and are in the words and figures following, to wit:

To the Honorable the Judge of the Probate Court of the city and county of San Francisco:

In the matter of the estate of George Hollingsworth, deceased.

The petition of William S. Chapman, of the city and county of San Francisco, in the State of California, respectfully shows:

That George Hollingsworth died, in the county aforesaid, sometime in the month of November, in the year 1855; that said deceased, at the time of his death was a resident of the county of San Francisco aforesaid, and that he has left estate therein and within the jurisdiction of this court. That due search and inquiry have been made to ascertain if said deceased left any will and testament, but none has been found, and according to the best knowledge and belief of your petitioner, said deceased died intestate. Your petitioner further shows that the estate of the said deceased, so far as he has been able to ascertain the same, is of about the value of five
121 thousand seven hundred ($5,700) dollars, and consist of a certain pre-emption right or claim, and the improvements thereon made by said deceased during his lifetime, under and by virtue of the pre-emption laws of the United States, situate in said county of San Francisco, and known and described as follows, to wit, the fractional southeast quarter of section number thirty-six (36), in township number two (2) south, of range number six (6) west, of the Mount Diablo meridian. That the said deceased died leaving him surviving his widow, Elizabeth Hollingsworth and four children, viz: three sons, David Hollingsworth, aged thirty (30) years; Benjamin Hollingsworth, aged twenty-seven (27) years; and Edwin Hollingsworth, aged eighteen (18) years; and one daughter, unmarried, Virginia Hollingsworth, aged (20) years.

That the said Elizabeth Hollingsworth, widow of said deceased,

died intestate in Monroe county, in the State of Missouri, some time in the month of May, in the year 1857.

That the only heirs of the said deceased, now him surviving, so far as known to your petitioner, are his said above-mentioned children, who all reside in Monroe county, in the State of Missouri, with the exception of Benjamin Hollingsworth, who resides in Bienville parish, in the State of Louisiana. That the said Benjamin Hollingsworth, David Hollingsworth, and Edwin Hollingsworth, children and heirs of the said deceased, as aforesaid, do not
122 desire to undertake the adminstration of the said estate of the said deceased, and have requested of your petitioner his consent to be appointed administrator thereof in that behalf.

That your petitioner hereby consents to act as such administrator. Wherefore your petitioner prays that a day of court may be appointed for hearing this application; that due notice thereof be given by the clerk by posting notice according to law, and that upon said hearing and the proofs to be adduced, letters of administration upon said estate may be issued to your petitioner.

And your petitioner will ever pray, &c.

Dated at San Francisco, California, November 12th, 1867.

WILLIAM S. CHAPMAN.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

On the twelfth day of November, in the year of our Lord one thousand eight hundred and sixty-seven, personally appeared before me William S. Chapman, the petitioner named in the foregoing petition, who, being by me duly sworn, did depose and say that he had read the foregoing petition by him subscribed and knew the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

WILLIAM S. CHAPMAN.

[Endorsed:] 2747. Probate court, city and county of San
123 Francisco, California. In the matter of the estate of George Hollingsworth, deceased. Petition of William S. Chapman to be appointed administrator, etc. Wm. H. Hasbrouck, San Francisco, Cal., attorney for petitioner. Filed Nov. 12, 1867. Wm. Loewy, clerk. By A. J. Jeghers, dep. clerk.

In the Probate Court in and for the County of San Francisco, California.

In the Matter of the Estate of George Hollingsworth.

STATE OF MISSOURI, }
County of Monroe, } *ss:*

JOHN C. KIPPER and THOMAS SANDERS, being each duly sworn, deposes and says for himself, that affiants reside at ———, in Monroe county, State of Missouri; that about the year A. D. 18—, or

prior thereto, affiants became acquainted with said George Hollingsworth and his family.

That they, affiants, have known said family ever since, and knew said George until his removal from said State of Missouri to said State of California, to wit, about the year A. D. 1850.

That on the —— day of ———, A. D. 1857, the said family of said George Hollingsworth consisted of his wife, Elizabeth, and his sons, David Hollingsworth, Benjamin Hollingsworth, and Edwin Hollingsworth, and his daughter, Virginia Hollingsworth; that said Elizabeth, wife of said George Hollingsworth, died intestate on or about the — day of May, A. D. 1857.

That said Virginia Hollingsworth is unmarried.

124 That said children, except the said Benjamin Hollingsworth, are now living in said Monroe county, and are of the folowing ages respectively, to wit:

Said David Hollingsworth is of the age of about 29 years.

Said Benjamin Hollingsworth is of the age of about 26 years.

Said Edwin Hollingsworth is of the age of about 17 years, and said Virginia Hollingsworth is of the age of about 19 years.

That affiants have read and know the contents of a certain petition, dated at Paris, Monroe county, Mo., the — day of —, 1866, to thd probate court in and for the county of San Francisco, in said State of California, wherein it is stated that said David Hollingsworth, Benjamin Hollingsworth, and Edwin Hollingsworth do not desire to undertake the administration of the estate of said George Hollingsworth, the deceased, and request that William S. Chapman, a resident of the State and county last aforesaid, may be appointed in their stead as the administrator of said estate.

And affiants further say that said petition was signed by said David Hollingsworth, and said Benjamin Hollingsworth, and said Edwin Hollingsworth, known to affiants to be the persons named in said petition as the petitioners thereof; that said several petitioners, except the said Benjamin Hollingsworth, in person acknowledged to affiants that they, said petitioners, had so signed

125 the same for the purposes therein mentioned; and that said petitioners so signing the same are known by affiants to be the identical persons named in said petition as the sons of said George Hollingsworth, deceased.

And further affiants say not.

J. C. KIPPER.
THOMAS SANDERS.

Subscribed and sworn to before me this 6th day of August, 1866.

In testimony whereof, I, Henry Davis, clerk of the circuit court in and for the county of Monroe, and State of Missouri, hereto set my hand and affix the seal of said court. Done at office in Paris, this day and year last above written.

[SEAL.] HENRY DAVIS, *Clerk.*

[Endorsed:] Probate court, city and county of San Francisco, California. In the matter of the estate of George Hollingsworth,

deceased. Affidavit of John C. Kipper and Thomas Sander that David Hollingsworth, Benjamin Hollingsworth, and Edwin Hollingsworth, the petitioners named in the petition, praying the appointment of William S. Chapman as administrator, &c., of Geo. Hollingsworth, deceased, are the same persons named in such petition, &c.

Probate Court, County of San Francisco, California.

In the Matter of the Estate of George Hollingsworth (deceased).

Your petitioners respectfully show to this court:

126 That they are the only sons of George Hollingsworth, deceased, and as such are entitled to administer upon the estate of said deceased.

That said George Hollingsworth, in the year A. D. 1850, removed from the county of Munroe in the State of Missouri, to the State of California.

That on or about the — day of November, A. D. 1855, he died intestate, being then a resident of the county of San Francisco, in said State of California, and leaving estate therein consisting of a pre-emption claim and the improvements thereon upon public lands of the United States, to wit, in lands now including the fractional southeast quarter of Section No. thirty-six (36), in township No. 2 south, of range No. (6) west.

That the family of said deceased resided in said Munroe county at the date of his said removal to California, and have so ever since continued to reside except your petitioner, Benjamin Hollingsworth, who is now a resident in the State of Louisiana.

That on the — day of November, A. D. 1855, said family consisted of Elizabeth, wife of said deceased, and David Hollingsworth, Benjamin Hollingsworth, and Edwin Hollingsworth, his only sons, and Virginia Hollingsworth, his only daughter.

That on the — day of May, A. D. 1857, the said Elizabeth, wife of said deceased, died intestate.

127 That said David Hollingsworth is of the age of twenty-nine years, said Benjamin Hollingsworth is of the age of twenty-six years, and said Edwin Hollingsworth is of the age of seventeen years, and the said Virginia Hollingsworth is of the age of nineteen years, and that said Virginia is a *femme sole*.

That your petitioners do not desire to undertake the administration of said estate, but William S. Chapman, a resident of said county of San Francisco, has consented to serve in that capacity, as will appear by his petition for letters of administration presented and filed herewith.

Wherefore, your petitioners request that said William S. Chap-

man may be appointed in their stead as the administrator of the estate of said George Hollingsworth, deceased.

BENJAMIN HOLLINGSWORTH,
DAVID HOLLINGSWORTH,
EDWIN HOLLINGSWORTH,

Signed in presence of—
JOE. L. BOND.
WM. W. PATTISON.

STATE OF LOUISIANA, }
Bienville Parish, } *ss*:

On this, the 29th day of June, A. D. 1866, personally appeared before me, the undersigned, Joseph D. Copeland, a notary public, duly commissioned and sworn, Benjamin Hollingsworth, who, being by me duly sworn, states that the above petition, and the matters therein as stated, he believes to be true, and the said Benja-
128 min Hollingsworth acknowledged before me, at the same time, that he signed said petition for the purposes therein mentioned.

BENJAMIN HOLLINGSWORTH.

Subscribed, sworn to, and acknowledged before me, the day and year last aforesaid.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office, at Arcadia, Bienville Parish, State of Louisiana, June 29th, A. D. 1866.

[SEAL.] JOS. D. COPELAND,
Notary Public.

David Hollingsworth and Edwin Hollingsworth signed the above and foregoing petition in our presence.

Witnesses:
J. C. KIPPEB.
THOMAS SANDERS.

[Endorsed:] 2447. Probate Court, city and county of San Francisco, California. In the matter of the estate of George Hollingsworth, deceased, petition of Benjamin Hollingsworth, David Hollingsworth, and Edwin Hollingsworth, heirs of George Hollingsworth, deceased, that Wm. S. Chapman, of San Francisco, State of California, be appointed to the administration, etc., of George Hollingsworth, deceased. Filed November 12, 1867. Wm. Loewy, clerk, by A. Jeghers, dept. clerk.

Order Appointing Administrator.

In the Probate Court of the City and County of San Francisco, State of California.

In the matter of the estate of George Hollingsworth, deceased.

129 The petition of W. S. Chapman, praying for letters of ad-

ministration of the estate of Geo. Hollingsworth, deceased, coming on regularly to be heard, and due proof having been made to this court that the clerk had given notice thereof for this day, by causing notices to be posted up in at least three public places in the city and county of San Francisco, one of which was at the place where this court is held, stating the name of the deceased, the name of the applicant and the term of this court at which the application would be heard, the same having been given at least ten days before the hearing, as appears by the affidavit of D. A. Baum, a competent witness, and that the notice was in all respects according to law; and it being proved by the oath of the petitioner and of Bartholomew L. Hollingsworth that the said George Hollingsworth died in the month of November, A. D. 1854, intestate, in the city of San Francisco aforesaid; that he was a resident of said city and county of San Francisco at the time of his death, and that he has left estate in the county of San Francisco and within the jurisdiction of this court; that the said petitioner is legally competent, and is requested to act as such administrator by the heirs of said deceased, and therefore entitled to letters of administration of said estate, and that there is no personal property belonging to the said estate, and that the estate for or in respect to which letters of administration are
130 applied for as aforesaid does not exceed the value of six thousand dollars ($6,000), and consists of a certain pre-emption right or claim of the deceased to about fifty-seven (57) acres of land, situated in the county of San Francisco, in the State of California, and known as the fractional southeast quarter of section thirty-six (36), in township two (2) south, of range six (6) west of the Mount Diablo meridian, and no persons interested in said estate appearing to contest the application of the said petitioner, it is ordered that letters of administration of the estate of the said George Hollingsworth, deceased, issue to the said petioner, Wm. S. Chapman, upon his taking the oath and filing a bond according to law, in the sum of one thousand dollars ($1,000).

Dated November 26, A. D. 1867.

M. C. BLAKE,
Probate Judge.

[Endorsed:] Probate court, city and county of San Francisco. In the Matter of the Estate of George Hollingsworth, deceased. Order appointing administrator. Filed Nov. 26, 1867. Wm. Loewy, clerk, by A. J. Jeghers, deputy clerk.

[2 50-cent rev. stamps.]

Bond of William S. Chapman, administrator of George Hollingsworth, deceased.

Know all men by these presents that we, William S. Chapman, as principal, and Bartholomew Hollingsworth and Alfred Godeffray,
131 of the city of San Francisco, in the State of California, sureties, are held and firmly bound to the State of California in the sum of one thousand ($1,000) dollars, lawful money of the United States of America, to be paid to the said State of Cali-

fornia, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 5th day of December, A. D. 1867. The condition of the above obligation is such that, whereas by an order of the probate court of the city and county of San Francisco, State aforesaid, duly made and entered on the 26th day of November, A. D. 1867, the above-bounden William S. Chapman was appointed administrator of George Hollingsworth, deceased, and letters of administration were directed to be issued to him upon his executing a bond according to law in said sum of one thousand ($1,000) dollars. Now, therefore, if the said William S. Chapman, as such administrator, shall faithfully execute the duties of the trust according to law, then this obligation to be void, otherwise to remain in full force and effect.

Signed, sealed, and delivered in the presence of—

WILLIAM S. CHAPMAN. [SEAL.]
B. S. HOLLINGSWORTH. [SEAL.]
ALFRED GODEFFRAY. [SEAL.]

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Bartholomew S. Hollingsworth and Alfred Godeffray, the sureties named in the above bond, being duly sworn, each for
132 himself, says that he is a householder and resident within said State, and is worth the said sum of one thousand dollars over and above his debts and liabilities, exclusive of property exempt from execution.

B. S. HOLLINGSWORTH.
ALFRED GODEFFRAY.

Subscribed and sworn to before me, this 5th day of December, A. D. 1867.

A. J. JEGHERS,
Dep. County Clerk.

Approved this 7th day of April, A. D. 1868.

SELDEN S. WRIGHT,
Probate Judge.

[Endorsed:] Filed April 7th, 1868. Washington Bartlett, clerk. By A. J. Jeghers, deputy clerk.

Recorded the foregoing bond, this 7th day April, A. D. 1868.

WASHINGTON BARTLETT, *Clerk.*
By ——— ———, *Dep. Clerk.*

Letters of Administration.

In Probate Court.

STATE OF CALIFORNIA,
City and County of San Francisco:

William S. Chapman is hereby appointed administrator of the estate of George Hollingsworth.

Witness Washington Bartlett, clerk of the probate court of the city and county of San Francisco, with the seal of said court affixed, this eighth day of April, A. D. 1868. By order of the court.

[SEAL.] WASHINGTON BARTLETT, *Clerk*,
By A. J. JEGHERS, *Dep. Clerk*.

133 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California; and that I will faithfully discharge the duties of administrator of the estate of George Hollingsworth, deceased, according to law.

WM. S. CHAPMAN.

Subscribed and sworn to before me, this eighth day of April, 1868.

A. J. JEGHERS,
Deputy County Clerk.

[Endorsed:] Probate court, city and county of San Francisco. In the matter of the estate of George Hollingsworth, deceased. Letters of administration issued April 8th, 1868, to William S. Chapman. Filed April 8th, 1868. Washington Bartlett, clerk. By A. J. Geghers, deputy clerk.

It was thereupon admitted by said plaintiff that no proceedings whatever have been taken and nothing whatever done in the matter of the estate of said George Hollingsworth, deceased, as shown by the records of said probate court, nor in fact since the date and issuance of said letters of administration.

Defendant then called as a witness for him one J. G. Knowles, and offered to prove by him that said George Hollingsworth never settled on the land now in dispute for himself; that he never
134 fenced nor cultivated any part of said land; that whatever he did upon said land was done for his brother, B. S. Hollingsworth, and because the said B. S. Hollingsworth desired to take up the claim as a pre-emptor of said land, but was unable to do so in his own name; that all that was done upon said land was the enclosing of the same by the said B. S. Hollingsworth; that subsequent to said George Hollingsworth's death, said B. S. Hollingsworth, in his own name, leased said land to said witness, and that said witness held said land under B. S. Hollingsworth for some years thereafter, and that the setting up of a pre-emption claim to said land in the name of said George Hollingsworth, deceased, was from its inception a fraud upon United States. To the admission of which in evidence said plaintiff objected on the ground that there is nothing in the pleadings to justify any such evidence, and that said evidence was irrelevant, immaterial, and incompetent. The court sustained said objections and refused to receive said evidence, to which refusal said defendant then and there excepted.

Defendant then offered and read in evidence the declaration of intention of the said Thomas Quinn to become a citizen of the

United States of America, made on the 9th day of January, 1869, and certified from the office of the clerk of the fourth district court of the city and county of San Francisco

135 Said plaintiff admitted that the Thomas Quinn therein mentioned is the defendant in this present action.

Thereupon said court adjourned until 10 o'clock a. m., January 25th, 1876.

On January 25, 1876, the trial of said cause was resumed.

Whereupon defendant offered in evidence a copy of the declaratory statement filed by the said William S. Chapman, administrator of the estate of George Hollingsworth, in the U. S. Land Office at San Francisco, dated April 8th, 1868, and filed on that day, for the land in dispute in this action, said copy being certified to be a true copy by H. G. Rollins, register of said land office, which was thereupon read in evidence without objection, and is in the words and figures following, to wit:

Declaratory Statement.

I, William S. Chapman, of San Francisco county, State of California, as administrator of the estate of George Hollingsworth, deceased, who in his lifetime was a native born citizen of the United States and the head of a family, and about November, A. D. 1855, died intestate, leaving heirs consisting of several children who are now living, and did, on the 3d day of August, A. D. 1853, settle and improve the lots numbered four (4), five (5), and six (6), section number thirty-six (36), in township number two (2) south, of range number six (6) west, Mt. Diablo meridian, in the district of

136 lands subject to sale at the land office at San Francisco, State of California, and containing 56.07 acres, which land has not yet been offered at public sale and thus rendered subject to private entry; and I do, for and in behalf of the heirs of said Hollingsworth, deceased, hereby declare my intention to claim the said tract of land as a pre-emption right under said act of 4th September, 1841, and the act of March 3d, 1853, and the act of March 3, 1843.

Given under my hand this eighth day of April, A. D. 1868.

WM. S. CHAPMAN.

In presence of C. GURNEE.

[Endorsed:] No. 4328. Filed April 8, 1868.

U. S. LAND OFFICE,
SAN FRANCISCO, CALA., *August 8th*, 1872.

I hereby certify that the foregoing is a full, true, and correct copy of the original declaratory statement now on file in this office.

H. G. ROLLINS, *Register*.

Thereupon it was admitted by said plaintiff that the heirs of George Hollingsworth, deceased, never personally filed any declaratory statement for said lands now in dispute, and that no other declaratory statement on their behalf was filed, except that filed by the said Chapman, as above stated; and that said heirs of George

Hollingsworth, deceased, have never resided or lived upon or occupied or improved said lands in any manner whatever, and that
137 the said William S. Chapman never lived upon or occupied or improved said land in any manner whatever.

Defendant then called as a witness for him the said C. H. Chamberlain, receiver of the said land office at San Francisco, who testified that the State indemnity selection given in evidence by said plaintiff, has never been approved or listed over to the State of California by the U. S. Secretary of the Interior; that the N.W. ¼ of section 34, twp. 4 N., of R. 2 E., Mt. Diablo meridian, was selected by the State of California, on February 25th, 1867, in lieu of the whole S. E. ¼ of section 36, in twp. 2 S., R. 6 W., Mt. Diablo meridian; said last-mentioned selection being number 823, and filed in said U. S. land office, at San Francisco, on February 25th, 1867, and that said last-mentioned selection was on July 1st, 1871, approved, and the land thereby selected listed over to the State of California by the Secretary of the Interior.

Thereupon said defendant again offered to give in evidence the original record of proceedings in the case of Josefa De Haro and others, against the United States, being numbered 380 of the U. S. district court, in and for California, for the tract of land known as the Laguna de la Merced, embracing the petition and claim of the said Josefa De Haro and others for said land, filed before the U. S. Land Commissioner on March 16th, 1852, showing the confirmation of said claim by the U. S. Land Commissioners on July
138 24th, 1855, the confirmation by said district court on January 13th, 1858; the dismissal of the appeal from said last-mention decision, on March 19th, 1858; the proceedings for the segregation and ascertainment of the boundaries of said tract of land so confirmed to said Josefa De Haro and others, showing that such segregation and ascertainment of boundaries was never completed or made final until January 10th, 1868, when the same became final by decree of said U. S. district court, approving of the final survey of said tract known as "Laguna de la Merced," and excluding therefrom the land now in dispute in this action.

Defendant also offered to prove by competent testimony in connection with the last mentioned documentary evidence, that the land in dispute in this present action was embraced within, and always down to January 10th, 1868, was a part of the tract of land so as aforesaid claimed by said Josefa De Haro and others as "Laguna de la Merced," and a part of the land described by metes and bounds in the said petition of the said Josefa De Haro and others, and so as aforesaid confirmed by said land commissioner and district court, and that the land now in dispute was excluded therefrom only by said final survey of said "Laguna de la Merced." To the admission of which in evidence, said plaintiff objected on the grounds following, to wit: *First.* Upon the ground that it has already been ruled upon by this court. *Second.* That said
139 evidence is irrelevant, immaterial, and incompetent. *Third.* That defendant's allegation being that said Chapman obtained the title to the land in dispute by perjury and false testimony, he

cannot claim that it was by a mistake of law. *Fourth.* That defendant under his cross-complaint showed that he had no right to the land, because he made no proof of his right before the register and receiver, which is a vital and necessary step to the establishment of his right, with which step this court cannot dispense.

Thereupon said objections and the admissibility of said evidence was again argued by counsel, and said arguments adjourned from day to day until January 31st, 1876, when said court sustained said plaintiff's objections and rejected the evidence so as aforesaid offered by said defendant, to which ruling of the court said defendant then and there excepted.

Thereupon plaintiff admits that whenever facts averred in defendant's cross-complaint are not denied by plaintiff's answer to said cross-complaint, and become thereby admitted, the corresponding facts averred in the third defence of said defendant's answer shall be taken to be, and are in like manner, admitted by said plaintiff.

Thereupon said defendant states that under the ruling of the court in rejecting the last offered documentary and other evidence, it will be impossible for said defendant to make out the case stated
140 in his third defence and in his cross-complaint herein, the court by such ruling having refused to admit the only legal proof of one of the most material averments in said third defence and cross-complaint, and that it will be, therefore, useless and wasting the time of this court to proceed further in the trial of said action.

The plaintiff, through his counsel, then stated in open court that he would waive all objection to any proof which defendant might offer in support of the charges, and each of them made in the answer and cross-complaint, of fraud and wrong doing on the part of said plaintiff.

Thereupon, at the request of said plaintiff, said defendant admits that the said George Hollinsworth died intestate, in the State of California, late in the year 1854, leaving surviving him a widow, who died about the year 1857, and four children, named Benjamin Hollingsworth, David Hollingsworth, Edwin Hollingworth, and Virginia Hollingsworth, who have signed the deed to the said William S. Chapman, which has been given in evidence herein, and that said children were of the age of majority when they signed said deed.

The foregoing was all the evidence given or offered upon said trial, and said case was thereupon closed.

Thereupon said defendant insisted that no judgment could be rendered herein in favor of said plaintiff, because: *First.* The evidence given shows that if the title of said land was vested by
141 said United States' patent (given in evidence) in the heirs of George Hollingsworth, deceased, still, there being an administration upon the estate of the said Hollingsworth, and said administration not having yet been closed, nor any distribution of said estate having been made to the heirs of said estate, the right of possession of said land was, at the commencement of this action, and still is, in the administrator of said estate as administrator, and not in the plaintiff in his individual and personal character.

Eighth Exception. *Second.* That the deed from said heirs of George Hollingsworth to said plaintiff was executed before the issuance of said patent, and before any title was vested in said heirs; and said defendant thereupon moved that judgment be entered in this action for said defendant, and the court denied said motion, to which denial said defendant then and there excepted.

Ninth Exception. Thereafter, on December 30th, 1876 said court filed its findings and decision herein, awarding judgment in favor of said plaintiff for the possession of said land, to which findings and decision said defendant duly excepted.

And now said defendant, having heretofore and in due time given said plaintiff due notice of his intention to make this motion, and the time for him to prepare and serve upon said plaintiff a draft of statement of case on motion for new trial herein having been duly extended to, and including the present time, moves the court
142 the court to vacate and set aside said findings and decision, and to grant him a new trial of said action on the following grounds, to wit:

1st. Insufficiency of the evidence given upon said trial to justify the findings and decision of the court.

And as particulars in which said evidence was insufficient, said defendant specifies as follows, to wit:

(1.) Said evidence, admitted on said trial, was insufficient to justify the "first" finding of fact, filed by the court herein.

(2.) It was insufficient to justify the "second" finding of fact, filed by the court herein.

(3.) It was insufficient to justify that portion of the "third" finding of fact filed by the court herein, which declares that "a lawful plat of a lawful survey of township 2 S., range 6 W., from the Mount Diablo meridian, was made and approved by the U. S. surveyor general for the State of California, on the 16th day of October, A. D. 1863, and a certified copy thereof was on the same day filed in the U. S. land office at San Francisco.

(4.) It was insufficient to justify the "fifth" finding of fact, filed by said court herein.

(5.) It was insufficient to justify the "sixth" finding of fact, filed by said court herein.

(6.) It was insufficient to justify the "eighth" finding of fact, filed by said court herein.

143 (7.) It was insufficient to justify the "ninth," "tenth," and "eleventh" findings of fact, filed by said court herein, or either or any of them.

(8.) It was insufficient to justify the last clause of the "twelfth" finding of fact, filed by said court herein, in the words following, to wit, "but not in execution of any illegal or fraudulent purpose or undertaking."

(9.) It was insufficient to justify the "fifteenth" finding of fact, filed by said court herein.

(10.) It was insufficient to justify the "seventeenth" finding of fact, filed by said court herein.

(12.) It was insufficient to justify the last clause of the "eigh-

teenth" finding of fact, filed by said court herein, in the words following, to wit, "and did acquire the right to enter the same under said laws."

(13.) It was insufficient to justify the "nineteenth" finding of fact, filed by said court herein.

(14.) It was insufficient to justify the first clause of the "twenty-fourth" finding of fact, filed by said court herein, in the words following, to wit: "Said plaintiff did not fabricate or cause, or procure to be fabricated, said petition or said certificate, or either of them.

(15.) It was insufficient to justify the "twenty-fifth" finding of fact, filed by said court herein.

(16.) It was insufficient to justify the "twenty-sixth" finding of fact, filed by said court herein.

(17.) Said evidence showed no right to sue or maintain this action by said plaintiff in his own *personal* right and character,
144 but at most, only his representative right and character of *administrator* of George Hollingsworth, deceased, the administration of the estate of the said George Hollingsworth being still unsettled and unclosed, and no distribution of the land in dispute herein having ever been made by the probate court having jurisdiction of such administration and of said estate.

2d. That said findings and decision are, and each of them, is against law.

3d. Errors in law which occurred at said trial and were excepted to by said defendant.

And said defendant relies upon the particular errors following, to wit:

(1.) In admitting in evidence, against defendant's objections, the entry in the book kept in the U. S. land office at San Francisco, of lands selected by the State of California in lieu of 16th and 36th sections of school lands lost by said State.

(2.) In admitting in evidence the deed purporting to be from David Hollingsworth and others to said plaintiff.

(3.) In sustaining the objections made by said plaintiff to the original record of the case of Josefa De Haro and others against the United States, being docket number 380 of the U. S. district court for the State of California, and to the proof which said defendant offered to make thereby and to make in connection therewith, and in rejecting said evidence and refusing to allow the same to be given.

145 (4.) In sustaining the objections made by said plaintiff to the original letter, dated April 29th, 1870, from the Commissioner of the U. S. General Land Office to Messrs. Lane & Newman, in reference to the application of said defendant to file a declaratory statement for the land in dispute herein, and in refusing to receive said letter in evidence.

(5.) In sustaining the objection made by said plaintiff to the original letter, dated June 30th, 1870, by Jos. S. Wilson, commissioner, to Messrs. Lane & Newman, attorneys for said defendant, in reference to the application of said defendant to file a declaratory

statement upon the lands now in dispute, and in rejecting said letter as evidence.

(6.) In sustaining the objections made by said plaintiff to the proof, which said defendant offered to make by his witness, J. G. Knowles, and in refusing to admit and receive said proof.

(7.) In sustaining the objections made by said plaintiff to the original record, (when re-offered in evidence by said defendant,) of the case of Josefa De Haro and others against the United States, and to the proof which said defendant offered to make thereby, and to make in connection therewith, and in rejecting said original record and proof.

(8.) In denying said defendant's motion, made at the close of this case, for judgment herein for said defendant.

146 (9.) In its findings and decision herein, viz., in finding matters in the first clause of the 5th finding of the fact herein, which are not embraced within, but are outside of any issue joined herein.

In making said 4th and 5th findings of fact herein, which are in effect contradictory to each other.

In deciding that said plaintiff in his *personal* character and right, "was at the commencement of this action, and is now, entitled to recover from defendant the possession of the land in the complaint," when, as matter of *law*, arising upon the uncontradicted fact of an existing and unclosed administration of said land as part of the estate of George Hollingsworth, deceased, the *administrator* of said estate was, if any one claimed thereunder entitled to such posession, and *not* said plaintiff suing in his *personal* character and right.

The foregoing statement of case on motion for a new trial has been settled by me and is correct.

E. D. WHEELER, *Judge.*

[Endorsed:] No. 437. Nineteenth district court, city and county of San Francisco. Wm. S. Chapman *vs.* Thomas Quinn. Engrossed statement on motion for a new trial. Filed May 2, 1877. Thos. H. Reynolds, clerk. By Bert McNulty, dep. clerk.

147 *Order Denying Defendant's Motion for a New Trial.*

[Title of Court and Cause.]

FRIDAY, *July 13th*, 1877.

It is ordered that defendant's motion for a new trial herein be, and the same hereby is, denied; counsel for defendant excepting to the ruling of the court

[Duly certified.]

Notice of Appeal.

[Title of Court and Cause.]

You will please take notice that the defendant in the above entitled action hereby appeals to the supreme court of this State from the judgment therein entered in the said district court on the 20th day of January, 1877, in favor of the plaintiff in said action, and against said

defendant, and from the whole thereof; also from the order of said court made and entered in the minutes on the 13th day of July, 1877, denying said defendant's motion for a new trial of said action.

Dated this twenty-first day of July, 1877.

Yours, &c., JAMES B. TOWNSEND,
Attorney for Defendant.

To the clerk of said district court, and Messrs. Wright & Nourse, attorneys for plaintiff.

[Endorsed:] Filed July 21st, 1877. Thos. H. Reynolds, clerk, by W. Stevenson, deputy clerk.

148 Due service and receipt of a duplicate heref admitted this 21st day of July, 1877.

GEO. A. NOURSE,
Attorney for Plaintiff

Order Fixing Undertaking.

[Title of Court and Cause.]

On motion of J. B. Townsend, Esq., attorney for said defendant, the court hereby fixes the sum of one thousand dollars as the amount of the undertaking to be given by the defendant in the above entitled action to stay the delivery of possession of the real estate mentioned in said judgment pending defendant's appeal to the supreme court of California, as specified and required by the 945th section of the code of civil procedure of this State.

Dated this 23d day of July, A. D. 1877.

E. D. WHEELER, *Judge.*

[Endorsed:] No. 437. Nineteenth district court, city and county of San Francisco. Wm. S. Chapman *vs.* Thomas Quinn. Order fixing the amount of the undertaking. Filed July 23d, 1877. Thomas H. Reynolds, clerk. By M. A. Wilson, dep. clerk.

Undertaking on Appeal concerning Real Property and Money Damages.

[Title of Court and Cause.]

Whereas, Thomas Quinn, the defendant in the above entitled action, has appealed to the supreme court of the State of Cali-
149 fornia, from a judgment made and entered against him in the said action, in the said district court in favor of the plaintiff in the said action on the 20th day of January, A. D. 1877, for the recovery of the possession of certain lands and premises therein described, and — dollars and — *dollars* costs of suit.

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, William Trenouth, of the county of Santa Clara, and State of California, and B. B. Newman, of the city and county of San Francisco and State aforesaid, do hereby jointly and severally undertake and promise on the part of the appellant, that the said appellant will pay all damages and costs which may

be awarded against him on the appeal or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And, whereas the appellant is desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of — dollars, being the amount named in the same judgment, that if the said judgment appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant will pay the amount directed to be paid by the
150 judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and cost which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty (30) days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of respondent in his favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

And whereas, the appellant is desirous of staying the execution of the said judgment so appealed from, in so far as relates to the delivery of possession of the said land and premises, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of one thousand ($1,000) dollars, (being the amount for that purpose fixed by the judge of this court); that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the said judgment and order appealed from be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, not exceeding the
151 said sum of one thousand ($1,000) dollars, so as aforesaid fixed by the judge of this court, by which the said judgment was rendered and made.

Dated this 23d day of July, A. D. 1877.

WILLIAM TRENOUTH. [SEAL.]
B. B. NEWMAN. [SEAL.]

STATE OF CALIFORNIA, }
City and County of San Francisco. } *ss:*

William Trenouth and B. B. Newman, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says: That he is worth the amounts specified in said undertaking, as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within the State of California.

WILLIAM TRENOUTH,
B. B. NEWMAN.

Subscribed and sworn to before me, this 23d day of July, A. D. 1877.

[SEAL.] OSCAR T. SHUCK,
Notary Public.

Endorsed: Filed July 23d, 1877. Thos. H. Reynolds, clerk. By W. Stephenson, deputy clerk.

152 *Undertaking on Appeal from an Order Denying a New Trial.*

[Title of Court and Cause.]

Whereas, Thomas Quinn, the defendant and appellant in the above entitled action, has appealed to the Supreme Court of the State of California from the order made and entered against him in said action, in said district court in said action, in favor of the plaintiff therein and against the defendant therein, denying the said defendants' motion for a new trial therein, and made and entered by said court on the 14th day of July, A. D. 1877. Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, B. B. Newman, a resident of the city and county of San Francisco and State of California, and William Trenouth, a resident of the county — Santa Clara and State of California, do hereby jointly and severally undertake and promise on the part of the appellant, that the said appellant will pay all costs and damages which may be awarded against him on appeal, not exceeding three hundred dollars, which amount we acknowledge ourselves jointly and severally bound.

Dated this 23d day of July, A. D. 1877, at the city and county of San Francisco, State of California.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

153 William Trenouth and B. B. Newman, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says that he is worth the amount specified in said undertaking, as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within the State of California.

B. B. NEWMAN.
WILLIAM TRENOUTH.

Subscribed and sworn to before me, this 23d day of July, A. D. 1877.

[SEAL.] OSCAR T. SHUCK,
Notary Public.

[Endorsed:] No. 437. Nineteenth district court, city and county of San Francisco. Wm. S. Chapman, pl'ff and resp., *vs.* Thomas Quinn, def't and app't. Undertaking on appeal from order denying new trial. Filed July 23d, 1877. Thos. H. Reynolds, clerk. By W. Stevenson, deputy clerk.

154 *Stipulation.*

It is hereby stipulated by and between the attorneys of the respective parties to the foregoing action that the foregoing printed transcript is a true and correct transcript on appeal in said action, and that good and sufficient undertakings on appeal from the judgment and order appealed from was duly filed with the clerk of said court on the 23d day of July, 1877, in said action.

Dated San Francisco, August 22d, 1877.

GEO. A. NOURSE,
Attorney for Respondent.
JAMES B. TOWNSHEND,
Attorney for Appellant.

155 *Certificate.*

[Title of Court and Cause.]

I, Thomas H. Reynolds, county clerk of the city and county of San Francisco, and *ex officio* clerk of the district court of the nineteenth judicial district of the State of California in and for the said city and county, hereby certify that I have compared the foregoing transcript with the original papers in the above entitled action, now on file in my office, and with —— orders therein made and entered on the minutes of said court, and that the said transcript is correct.

I further certify that a sufficient undertaking on appeal, in due form of law, was, on the —— day of ———, A. D. 18—, filed in said cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said district court, this —— day of ———, A. D. 18—.

THOMAS H. REYNOLDS, *Clerk.*
By ——— ———, *Deputy Clerk.*

156 *Opinion of Department Two. Filed March* 13, 1880.

CHAPMAN *vs.* QUINN. } No. 5770.

Chapman brought this action in the nineteenth district court to recover of defendant the undivided half of certain lots of land, situate in the city and county of San Francisco. The complaint is in the form usually adopted in the action styled in this State ejectment. The lots sued for are described in the complaint as lots four, five, and six, in section thirty-six, of township two south, range six west, from the Monte Diablo base and meridian. The defendant filed an answer denying the allegations of the complaint, averring that the title to the lots sued for was in him, and also filed a cross-complaint, in which he averred, upon his information and belief, that under and by authority of the act of Congress of the 3d of March, entitled "An act to ascertain and settle private land claims in the State of California," Josefa de Haro and others claiming to be and being heirs of Francisco de Haro, deceased, on the 16th day

of March, 1852, filed before the board of commissioners created by said act, their petition and claim, wherein they asked for confirmation to them of a tract of land alleged to have been granted on or about the 27th day of September, 1835, by the Mexican authorities, to one Jose Antonio Galindo, and on or about the 12th day of May, 1837, conveyed by said Galindo to their said ancestor, de Haro; that said tract of land was known as the "Laguna de la Merced," and included the lots of land herein sued for; that by force of the laws of the United States said tract of land was from the date of the filing of the said petition, the 16th of March, 1852, and down to the 19th day of March, 1868, reserved from sale or alienation, and excepted from the pre-emption laws of the United States; that such proceedings were had upon the said petition and claim of the said Josefa de Haro and others after the filing of the same that said claim was finally confirmed to the claimants on the 13th day of January, 1858, by the decree of the district court of the United States for the northern district of California to the extent of one-half of a square Mexican league of land, to be located within the boundaries of the land set forth in said petition, but that the location of said half league was never ascertained not to cover or include the lots sued for, or any part thereof, until the —— day of ——, A. D. 1866, when such ascertainment was made by the judgment of the Supreme Court of the United States, a mandate of which judgment was filed in the said district court of the United States on the 21st day of March, 1866; that no lawful plat or survey of township 2, south of range 6 west, of the Mount Diablo base and meridian, which includes the said lots of land, made or approved by the United States surveyor general of California was ever filed in the United States Land Office for the district of San Francisco, in which district said lots of land and said township are wholly situated, until the said 19th day of March, 1868, when said plat was duly filed in said office, showing said lots of land to be public land of the United States; that the whole of section 36 of said township 2 south, range 6 west, with the exception of the lots sued for, which lots amount to 56 $\frac{1}{100}$ acres was and has been taken and covered by and included within the final surveys of the finally confirmed Mexican private land claims respectively known as the "Laguna de la Merced" and "San Miguel," and that in consequence of the whole of said section, with the exceptions mentioned being so taken and lost to the State of California as school land, the said State had, prior to the settlement of this defendant upon said lots, taken, selected and received other public land of the United States, situated on the same land district, in lieu of the whole of said thirty-sixth section, which lieu selections, prior to such settlement by defendant, had been approved, and the land so selected certified over to said State by the United States whereby the title to said lieu selections became, and still is vested in said State or its assignees, as school land, instead and in lieu of said thirty-sixth section, said lots sued for became, and ever since have been, and still are public lands of the United States, and subject to its pre-emption laws.

That on the 5th day of February, 1869, the defendant having, as

is alleged with fullness and particularity, all the qualifications of a pre-emptor, settled upon the lots sued for, which were at the time vacant and subject to pre-emption, claiming the same under the pre-emption laws of the United States, erected a dwelling-house, and made other valuable improvements thereon, commenced to reside on, and has ever since continued to occupy, cultivate, improve and reside on these lots; that within three months after his settlement he tendered to the register of the land office at San Francisco, to be filed by said register in his office, his declaratory statement in writing, signed by him, and setting forth all the facts required by law, and at the same time tendered to this officer his lawful fees for filing this statement; that the register refused to receive this document; that defendant appealed from this action of the register to the Commissioner of the General Land Office of the United States, who, on the 29th of April, 1870, affirmed the action of the register, and on his appeal to the Secretary of the Interior, this last named officer also affirmed the order of the commissioner; that this defendant has not been allowed to make proofs of his claim to said lots, though since the tender of declaratory statement as above stated, he has offered to make such proofs by competent witnesses, and has offered to comply in all respects with the laws and the regulations of the land department; that on the 28th of January, 1871, he applied to the register and receiver at the land office in San Francisco to purchase said lots, and offered to pay the price therefor as fixed by law, and all costs and charges incident to the purchase, which application was refused by the officers mentioned; that plaintiff, shortly after the filing of the decision of the Supreme Court of the United States above mentioned, though he was not qualified as a preemptor, undertook to obtain from the United States for his own use and benefit, fraudulently and by false testimony, and under the false pretense that one George Hollingsworth, then deceased, had in his lifetime settled upon, improved, and resided on the lots of land sued for, and had thereby acquired the rights of a pre-emptor to those lots, and that such rights of pre-emption had, by the death of said George, become vested in the widow and children of said George; that in execution of said purpose, plaintiff filed a petition according to law, on the probate court of the city and county of San Francisco, asking for letters of administration upon the estate of said George, whose death is alleged to have occurred in November, 1855, leaving an estate in said county consisting of a pre-emption claim to the said lots; that by order of the court mentioned plaintiff was appointed administrator of the estate of said George, and duly qualified as such on the 8th day of April, 1868; that on the same day plaintiff as such administrator, and under color of said letters of administration, and in further prosecution of his illegal purpose, filed in the land office at San Francisco, a paper purporting to be a declaratory statement under the laws of the United States, stating a settlement by his intestate in his lifetime on the lots in question and the improvement of the same under the pre-emption laws; that his said intestate resided thereon until his death, which took place in the city and county of San Francisco in the

month of November, 1855, and that he left him surviving several childred then living, on behalf of whom the declaratory statement was filed; that after the defendant had entered, settled, built a dwelling house and commenced to reside upon and whilst he was residing upon the lots in question, claiming the same under the pre-emption laws, and after he had tendered to the register his declaratory statement to be filed, and after the plaintiff had filed his said declaratory statement, the plaintiff, without notice — the defendant, or any appearance or contest by him, produced testimony before said register and receiver to the effect that said George Hollingsworth in his lifetime, and on or about the month of August, 1853, did settle, build a dwelling house on, cultivate and improve the said lots under the pre-emption laws of the United States, and did thenceforth and thereafter reside thereon, claiming the same under said laws down to the time of his death, and that said lots were during all of that time subject to pre-emption under said laws, and that said Hollingsworth thereby acquired, and at the time of his death possessed and held a right of pre-emption to said lots, whereas in truth and in fact said testimony was false, and was known by said Chapman to be so, and that said register and receiver, and said Commissioner of the General Land Office, and said Secretary of the Interior, were deceived and imposed upon by said false testimony, and said register was thereby induced to and did refuse to file this defendant's declaratory statement and to allow him to prove up and perfect his right and claim to said lots, and said commissioner and secretary were thereby induced to and did refuse to instruct said register to file defendant's declaratory statement and to allow him to prove up and perfect his right and claim to said lots under the pre-emption laws aforesaid, and to pay for and obtain a patent for the same, but, on the contrary, awarded said lots of land to said heirs of George Hollingsworth; that on the 28th day of January, 1871, the plaintiff paid to the receiver of the land office at San Francisco, the purchase price of said lots, together with the fees of the register and receiver, and received a certificate of purchase of these lots; that thereafter, in 1871, he obtained a patent of the United States for the said lots, which was issued to the heirs of plaintiff's intestate, and that on or about the first day of May, 1871, and prior to the issuance of said patent, the plaintiff procured to be executed to him by said heirs a deed purporting to convey to him an undivided half of their right and title in said lots, by virtue of which deed solely plaintiff seeks to recover on this action; that in truth and in fact said George Hollingsworth never did settle, build a dwelling-house, or reside upon or cultivate said lots of land, or any of them, or any part thereof, or ever claimed the same or any part thereof under the pre-emption laws of the United States, or otherwise, which facts were well known to plaintiff at the time of his taking the proceedings before stated herein; that said land was not at any time during the lifetime of said George subject to pre-emption, nor could any right thereto be acquired under or by virtue of the pre-emption laws of the United States in any manner or by any person whatsoever; that plaintiff has not and never had any title whatsoever to

said lots or my part thereof, except such as was, as aforesaid, fraudulently acquired and obtained by him under and by means of said proceedings and said patent; that, for the reasons herein set forth, the plaintiff should be held and adjudged a trustee for the defendant, and be compelled to convey to this defendant the title thus fraudulently acquired. Wherefore, the defendant asks that the plaintiff be decreed a trustee for him, and that the court compel him to convey to him the title acquired by plaintiff under the proceedings above set forth.

The matters set up in this cross-complaint were also pleaded as a separate defense to the action, styled herein the third defense.

The plaintiff answered the cross-complaint, and denied all the allegations of fraud therein contained, and denied that the lots sued for embraced within the limits of the tract of land as claimed by Josefa de Haro and others.

157 The cause came on for trial before the court, a jury having been waived. Judgment was rendered for plaintiff, a new trial was moved for and denied. Defendant prosecutes this appeal from the judgment and order just mentioned.

The plaintiff offered testimony by which he made out his case *prima facie*, and rested. It was then admitted that the title to the land in dispute never vested in the State of California. Whereupon the defendant to sustain his defense and cross-complaint, offered to give in evidence the original record in the case of Josefa de Haro and others against the United States, being docket number 380 of the United States district court for the State of California, said case having been commenced before the United States Commission appointed, and which sat under the act of Congress approved March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and said defendant offered to prove by said record that the said Josefa de Haro and others filed their petition and claim before said board of land commissioners, on the 16th day of March, 1852, claiming certain lands therein described by metes and bounds, courses and distances, claiming the same under a grant from the former Mexican Government, made September 27, 1835, of said tract of land, under the name of "Laguna de la Merced," and to prove thereby that said tract of land was confirmed to said Josefa de Haro and others by said board of land commissioners, on the 24th day of July, 1855, and thereafter an appeal to the said United States district court, duly prosecuted, was by said district court confirmed to said Josefa de Haro and others, on January 13, 1858, and that on the filing of the written statement of the United States Attorney-General that the appeal from said decree of said district court would not be prosecuted by said United States, the said appeal was, by said district court, on March 19, 1858, dismissed and the decree of said district court made final, and said claimants allowed to proceed thereon as upon final decree in their favor; and that proceedings were thereafter taken according to law, for the survey and segregation of the land so confirmed to said Josefa de Haro and others, but that such segregation never was made until January 10, 1868, when a plat of survey of

said Mexican grant so confirmed, and known as the "Laguna de la Merced," was by decree of said United States district court finally confirmed, by which survey the land now in dispute in this action was first excluded from the land so confirmed to Josefa de Haro and others; and said defendant offered to prove by competent testimony that the land now in dispute in this action was always included in and a part of the said claim of Josefa de Haro and others, as originally made in their said petition filed before the board of land commissioners, and as confirmed by said land commissioners and by said district court, and as existing down to January 10, 1868, when by final segregation said three fractions in dispute, lots four, five and six, were excluded from said Mexican grant "Laguna de la Merced," so confirmed to said Josefa de Haro and others.

When this offer was made it was admitted that the defendant possesed the qualifications to pre-empt, and occupied the status toward said lots which are set out in his third defence and cross-complaint. The plaintiff objected to the admission of the record and testimony of the defendant on the following grounds:

First. That the defendant cannot attack the patent of the United States given in evidence by plaintiff.

Second. That it did not lie in defendant's mouth to say that the land in dispute was not open to pre-emption at the time that George Hollingsworth is alleged to have settled thereon.

The admissibility of this evidence seems to have been argued at great length by the court below. During the argument, in reply to a question by the court, the counsel for defendant stated that his offer of said evidence was made for the purpose of showing that the land now in dispute was reserved from the acquisition of any pre-emption rights therein from March 16, 1852, down to the time when the survey of said ranch "Laguna de la Merced" was finally approved by the United States district court, at which time the land in dispute was for the first time excluded from said ranch; that said lots were included in the tract described in the petition and claim of Josefa D. Haro and others, down to the time of approval of the final survey of said tract, which had been confirmed to said Josefa and others, and that said lots were included within said tract confirmed until they were excluded on the final survey, above referred to.

The counsel for defendant having made this statement, plaintiff's counsel stated further objections to the offer, viz.:

That the question of fact, whether or not the land now in dispute was subject to pre-emption at the time George Hollingsworth made his settlement upon it, has been disposed of as a question of fact by the register and receiver of the United States land office at San Francisco and by the Commissioner of the General Land Office and the Secretary of the Interior.

Second. The complaint does not allege that any error of law was made by said land officer, or any of them, in their decisions preliminary to the issuing of the patent now in evidence.

Third. That there is no evidence upon the point of the alleged

fraud and imposition claimed to have been practiced upon said register and receiver, Commissioner, and Secretary, and claimed to have influenced them in their said decision.

Fourth. That it does not appear that any evidence whatever upon that point was offered by said Chapman or the heirs of said George Hollingsworth before said register and receiver. The court sustained these objections and defendant exeepted.

The object for which the foregoing offer was made was clearly explained by the counsel for defendant, to show in fact that the land sued for was not public land until the final survey of the rancho "Laguna de la Merced" was made and approved, and until that time, was withdrawn from entry, sale, or settlement as public land. Wherefore the settlement of Hollingsworth having been made in 1853, after the claim for the said lots was presented to the land commission, was of no validity.

To sustain the exception under consideration we are referred to Newhall *vs.* Sanger, 92 U. S. S. C. Rep., p. 761. That case was instituted in the Circuit Court of the United States for the district of California, and was brought by Sanger to determine the ownership of a quarter section of land, situated in this State, against Newhall. Sanger claimed title through the Western Pacific Railroad Company, to whom a patent was issued in 1870, under the provisions of the act of Congress, commonly known as the Pacific Railroad acts. Newhall derived title by mesne conveyances from one Dayton, the holder of a patent of a later date, which recited that the land was within the exterior limits of a Mexican grant called Moquelemos, and that a patent by mistake had been issued to the railroad company. The court below decreed in favor of Sanger; that he was the owner of the disputed premises, and that the junior patent, so far as it related to said premises, should be canceled. From this decree an appeal was prosecuted to the Supreme Court of the United States. That court reversed the decree and directed that the bill should be dismissed.

The title of the railroad company, under which Sanger attempted to make good his suit, was claimed to have been derived under the act of Congress of July 1, 1862. (See 12 Stat. at Large, 492.) This act grants to certain railroad companies, of which the Western Pacific, by legislation afterwards enacted, became one, every alternate section of public land designated by odd numbers, within ten miles of each side of their respective roads, not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached at the time the line of the road is definitely fixed. A map designating the general route of each road was to be filed in the Department of the Interior within a period designated, according to the requirements of the act referred to, and then it was made the duty of the Secretary of the Interior to cause the lands within a certain distance from such route to be withdrawn from pre-emption, private entry, and sale. Such proceedings were had that the withdrawal for the road mentioned was made on the 31st of January, 1865. The Moquelemos grant had been regularly presented to the board of Commissioners

under the act of the 3d March, 1851, (before referred to in this opinion,) and was duly prosecuted by appeal, and was rejected by the Supreme Court of the United States on the 13th of February, 1865. It was conceded that the lands embraced by it fell within the limits of the railroad grant above referred to. By the withdrawal mentioned, the grant took effect upon such odd numbered sections of *public lands* within the specified limits as were not excluded from its operation. On these facts, says Davis, J., delivering the opinion of the court, "the question arises whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then *sub judice*, are *public* within the meaning of the acts of Congress under which the patent was issued to the railroad company."

The court then proceeds to discuss this question, and arrives at the conclusion and holds that these lands were not lands, that is, not subject to pre-emption, private entry or sale, as long as the claim under a Mexican grant was *sub judice*.

It may be remarked here that the Moquelemos grant was rejected and held not to be a valid claim. In legal effect this was holding it never to have been granted. This fact did not escape the attention of the court. Reference is obviously made to it in these words: "This section (the court here refers to the sixth section of the act of the 3d of March, 1853, introducing the United States land system into California, 10 Stat. at Large, 246) expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said this means 'lawfully' claimed; but there is no authority to import a word into the statute in order to change its meaning." (92 U. S. Rep., 765.)

But whether the court was right or wrong on this point, in the case of the grant for the "Laguna de la Merced," the claim was declared valid, and having been so declared, it was *lawfully claimed* when it was presented to the board of land commissioners.

In a later case, Van Reynegan *vs.* Bolton, 95 U. S. Rep., p. 33, the Supreme Court held that lands claimed under Mexican grants in this State are restricted from settlement so long as the claims of the grantees remain undetermined, and that such claims were undetermined until a final survey was made and approved by the proper officers of the United States. This was so held against defendants, who claimed under the pre-emption laws of the United States after the final confirmation of the grant and while a contest was going on as to the survey of the land confirmed. See also Rutledge *vs.* Murphy, 51 Cal., 393.

In accordance with the decisions above referred to, we are of opinion that the court erred in excluding the evidence offered by the defendant. Defendant had a right to have the evidence admitted for the purpose of making proof of the facts to show which his counsel stated to the court he made the offer.

In consequence of this error the cause must be remanded to the court below to be tried anew. It is therefore proper to examine the other errors assigned in the rulings of the court, as the same questions may arise on the new trial.

Defendant in the progress of the trial called as a witness one J.

G. Knowles, and offered to prove by him that George Hollingsworth never settled on the land now in dispute for himself; that he never fenced nor cultivated any part of said land; that whatever he did upon said land was done for his brother, B. S. Hollingsworth, and because the said B. S. Hollingsworth desired to take up the claim as a pre-emptor of said land, but was unable to do so in his own name; that all that was done upon said land was the enclosing of the same by the said B. S. Hollingsworth; that subsequent to said George Hollingsworth's death, said B. S. Hollingsworth, in his own name, leased said land to said witness, and that said witness held said land under B. S. Hollingsworth for some years thereafter, and
158 that the setting up of a pre-emption claim to said land in the name of said George Hollingsworth, deceased, was from its inception a fraud upon the United States. To the admission of which in evidence said plaintiff objected, on the ground that there is nothing in the pleadings to justify any such evidence, and that said evidence was irrelevant, immaterial, and incompetent. The court sustained said objection, and refused to receive said evidence, to which refusal said defendant then and there excepted.

In the cross complaint, and in the third defense set up in the answer, defendant had pleaded that the officers of the Land Department of the United States had been deceived and imposed upon by false testimony in relation to the settlement by George Hollingsworth, in his lifetime, upon the lots in controversy, and in relation to said Hollingsworth's building a dwelling-house, cultivating and improving and residing on said lots, he had also set up in the pleadings referred to, that the statement as to the settlement, building, cultivating, and improving and residing on said premises were false, to the knowledne of the plaintiff, who, it seems, procured the testimony in regard to these matters to be adduced before the register and receiver of the land office at San Frrncisco. In consequence of this fraud and deception, alleged to be practiced on the land offices of the United States, defendant's rights had been prejudiced.

Knowles was produced as a witness by defendant, and the offer was made to show by him facts which tended to prove the truth of the allegations of the third defense, and of the cross-complaint just above referred to.

The cases justifying the admissibility of this evidence and showing its exclusion to be error are numerous. We will refer to some of them.

In Garland *vs.* Wynn, 20 How. U. S. Rep., 6, which came before the Supreme Court of the United States, by writ of error to the supreme court of Arkansas, it appears that in November, 1842, Wynn proved that he had a preference right of entry to the quarter section of land in dispute, according to an act of Congress of 1838, and his entry was allowed.

In February, 1843, Hemphill offered proof that he had an elder right to the same land under an act of Congress passed in 1830. The register and receiver decided in favor of Hemphill, set aside Wynn's entry, refunded the purchase money to him, and awarded a patent certificate to Hemphill, who assigned it to Garland, who

was defendant in the court below. Wynn brought his action against Garland, and the benefit of the patent was decreed to Wynn by the supreme court of Arkansas.

It appeared from the allegations and evidence that Garland and Hemphill, acting together, practiced an imposition by false testimony on the land officers. (See report of case, where the fraud is fully set forth.)

Garland pleaded that by law the circuit (State) court had no authority or jurisdiction to set aside or correct the decision of the register and receiver, and that their adjudication was final and conclusive. The same contention is made here on behalf of Chapman, the plaintiff.

The Court affirmed the judgment of the supreme court of Arkansas. It said (opinion by Catron, J.): "The question is, have the courts of justice power to examine a contested claim to a right of entry under the pre-emption laws said to overrule the decision of the register and receiver, confirmed by the Commissioner, in a case where they have been imposed upon by *ex parte* affidavits, and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of another's right, who had a preference of entry, which he preferred and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded."

The general rule is, that where several parties set up conflicting claims to property with which a special tribunal may deal, as between one party and the Government, regardless of the rights of others, the latter may come into the ordinary courts of practice and litigate the conflicting claims. Such was the case of Comegys *vs.* Vasse, (1 Peters, 212), and the case before us belongs to the same class of *ex parte* proceedings; nor do the regulations of the Commissioner of the General Land Office, whereby a party *may* be heard to prove his better claim to enter — oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this Court.

"It was in effect so held in the case of Lyle *vs.* The State of Arkansas (9 How., 328); next in the case of Cunningham *vs.* Ashley, (14 How.), and again in the case of Bernard *vs.* Ashley, (18 How., 44)."

These questions were again discussed at length, and with marked clearness and ability, by Miller, J., in Johnson *vs.* Towsley, reported in 13 Wall., p. 72. In that case it is held (and the decision has been followed ever since) that when the officers of the United States Land Department decide controverted questions of fact, *in the absence of fraud, or imposition, or mistake*, their decision on such questions is final, except as they may be reversed on appeal in that Department; but that where, on the application of the facti as found by such officers, *they by misconstruction of the law*, take from a party that to which he has acquired a legal right under the sanction of the law, a court of equity can give relief. (See Lytle *vs.* Arkansas, 22 How., 192–166; Lindsley *vs.* Harris, 2 Black, 194; Minnesota *vs.* Batchelder, 1 Wall., 109; Stark *vv.* Starrs, 6 Wall., 402; Silver *vs.* Ladd, 7 Id.,

219; Hosmer *vs.* Wallace, 47 Cal., 461; Hess *vs.* Bolinger, 48 Id., 353; Rutledge *vs.* Murphy, 51 Cal., 391.)

We are of the opinion that the cases above cited lay down correct rules, that under those rules the court erred in excluding the offer of the defendant above stated.

Near the close of the trial, and after it had occupied the attention of the court for several days, the defendant's counsel stated to the court that in consequence of the rulings of the court it would be impossible to make out his defence or his case under the cross complaint; counsel for plaintiff stated that he would waive all objection to any proof which the defendant might offer in support of the charges, and each of them made in the answer and cross-complaint, of fraud and wrong doing on the part of plaintiff. This was made some days after the rulings considered herein had been made.

To this the court made no response, and it does not appear that any notice was taken of it by defendant's counsel.

As the court took no action on this proposition, we do not think the counsel for defendant was called upon to say or do anything in regard to it, or that any waiver of any exception reserved by defendant was, under the circumstances, made by him.

On the argument it was earnestly contended on behalf of plaintiff that neither the court below nor this court had any jurisdiction of the subject matter of the third defence and cross complaint, on the ground that the State of California was admitted into the Union upon the express "condition that the people of said State, through their Legislature, or otherwise, shall never interfere with the primary disposal of the public lands within its limits," and that in this litigation an attempt is made by defendant to have the State courts do that which the people of this State are forbidden to do in any way or manner by the act of admission.

We do not see here any interference with the primary disposal of the public lands. The title has passed out of the United States by the patent. If this were not so, plaintiff himself could have no standing in court. The patent is his sole reliance for a recovery. Said the Supreme Court of the United States, in Bagnall *vs.* Broderick, 13 Peters, p. 450, speaking of the patent for lands issued by the United States, "until its issuance, the fee is in the Government, which by the patent passes to the grantee."

It was also held in the same case that where the title had passed out of the United States by conflicting patents, there can be no objection to the courts of a State giving effect to the better right in any form of remedy the Legislature or the courts of the State may adopt.

We can see no substantial distinction in the case, where the title of the United States has passed out of it by a single patent or by conflicting patents, inasmuch as the first patent always carries the title, and must as a general rule prevail, unless countervailed by equitable considerations.

We can see no difficulty on the point of jurisdiction which was raised and argued by plaintiff's counsel. In our opinion the United States had made a primary disposal of the land sued for by the is-

suance of its patent to the heirs of Hollingsworth when this action was commenced, and there has been no interference with this right.

A question is made by defendant as to the right of plaintiff to maintain this action, the administration of the estate of Hollingsworth not having been closed.

But under the act of Congress of March 3, 1843, (see second section of this act, 5 Stats. at Large, 620), in case of the death of the pre-emption settler before consummating his claim, the right is given to the executor, administrator, or one of the heirs "to file the necessary papers to complete the same." The act then goes on to provide "that the entry in such case shall be made in favor of 'the heirs' of the deceased pre-emptor; and a patent thereon shall cause the title to inure to said heirs, as if their names had been specially mentioned."

The legal title thus vests in the heirs. The land was never a part of the estate of plaintiff's intestate.

The plaintiff claims the interest sued for under a conveyance from the heirs. He can then maintain the action. The probate system of the State has no application to the case.

For the errors above pointed out herein, the judgment of the court below and its order denying a new trial are reversed, and the cause remanded to the superior court of the city and county of San Francisco for a new trial, in accordance with the views expressed in this opinion.

THORNTON, *P. J.*

We concur.
SHARPSTEIN, *J.*
MYRICK, *J.*

159 *Petition for Rehearing in Bank.*

In the Supreme Court of the State of California.

WILLIAM S. CHAPMAN
vs.
THOMAS QUINN. } No. 5770.

To the Honorable Robert F. Morrison, Chief Justice of the Supreme Court of the State of California:

William S. Chapman, plaintiff and respondent in the above entitled action, by his attorney, George A. Nourse, respectfully petitions that the appeal in the above action may be re-heard before the court above-named in bank.

I.

160 This action was brought to recover possession of lots 4, 5, 6, in section 36, town. 2 south, range 6 west, Mt. D. M., now parcel of the city and county of San Francisco, plaintiff alleging himself the owner in fee of an undivided half thereof.

The defendant, as the third defence of his answer, and in his cross-complaint, alleged that the plaintiff's only title was derived under a U. S. patent for the land in dispute, wrongly and fraudu-

lently procured by plaintiff to be issued to "the heirs of George Hollingsworth;" soid heirs having conveyed to plaintiff an undivided half of said lots.

Without repeating the verbose and rambling allegations of the answer, which have made the opinion of Department Two, in the case, so lengthy, it is enough to say, that the *gravamen* of its charges is substantially as follows—if we adopt the logical sequence, rather than the order pursued in the answer:

1. That the land in question was within the exterior limits of the Rancho Laguna de la Merced, until final approval of the survey of the grant, in 1866, which survey left the land in question (now a triangle between said grant and the rancho San Miguel) out of the grant, and so made it public land of the United States.

2. That, thereupon, the plaintiff, himself disqualified to pre-
161 empt tho land, devised a plan to secure it for himself, by procuring it to be entered under the U. S. pre-emption laws, by the pretended heirs of one George Hollingsworth, upon a pretended settlement of said George Hollingsworth in 1853, and his death the following year, before consummating his purchase by pre-emption.

3. That in truth and in fact said Hollingsworth never settled or lived on said land, and had never a pre-emption right thereto.

4. The answer goes on to charge upon plaintiff a course of fraud and crime, in pursuance of this plan, such as should cover him with infamy and lock him up at San Quentin, if the charges be one-tenth part true;—such as should send to the same place his defamers (both client and lawyers), if they be not true.

It is charged that he "*caused and procured to be fabricated*" a petition to the probate court of San Francisco for the appointment of himself as administrstors of the estate of Geo. Hollingsworth, deceased,—purporting to be signed by Benjamin, David, and Edwin, sons of Geo. Hollingsworth,—some residing and signing in Missouri and one in Louisiana, and also an affidavit of two persons (Kipper and Sanders) in aid of the statements of said petition.

The statements of this petition, (*inter alia*, that Geo. Hollingsworth died leaving him surviving a widow, since deceased, and four children) are all charged to be false; the signatures of the peti-
162 tioners and affiants are alleged to be forged; and the very existence of such persons denied; and the signatures and certificates of the officers administering the oaths—made under their respective seals of office, are declared never to have been made by such officers. It is alleged with special emphasis, that "*the said George Hollingsworth had not, and did not leave at the time of his death, any wife, children, or child him surviving.*"

The statements of plaintiff's own sworn petition to the probate court, for letters of administration, are in like manner declared to be false.

In support of these charges of prejury, subornation of perjury, and forgery made against the plaintiff, not one word of testimony was offered, as may be seen by the statement of the proceedings at the trial. The court below found all these charges to be false.

Defendant admitted at the trial (fol. 416) that Geo. Hollingsworth died in 1854, leaving him surviving a widow (who died about 1857) and four children, named respectively Benjamin, David, Edwin and Virginia.

Yet no offer has been made to amend the answer by striking out these charges, thus adjudged or admitted to be false.

I allude to this, that it may be seen that the remaining charges of fraud, made in this remarkable answer, against the plaintiff, are not entitled to such weight in the absence of proof thereof, that the law should be wrested and twisted, in order to remedy the alleged wrongs suffered by defendant; that the mere allegation by
163 defendant of the fraud charged by him to nave been committed by plaintiff in making proof in the U. S. Land Office, should not prejudice the court, nor raise a presumption in the minds of the Judges, that he perpetrated such frauds.

II.

The answer and cross-complaint, as they stood when the trial began, further charged in substance:

1. That Chapman (having by these forgeries, perjuries, and subornations of perjury, procured letters of administration on the estate of George Hollingsworth), as such administrator, filed in the U. S. land office at San Francisco, April 8th, 1868, a declaratory statement, under the U. S. pre-emption laws, setting forth Hollingsworth's pre-emption settlement and subsequent death, and claiming a right in his heirs to enter the land by virtue thereof.

2. That on the 18th day of August, 1868, said plaintiff, one Bepler, claiming a pre-emption right to the lots, and O. Livermore, claiming under the State of California, appeared before the register and receiver of said land office, and presented testimony to support their respective claims.

3. That these officers decided in favor of Livermore and the State of California September 2, 1869.

164 4. That, on Chapman's appeal from the decision, the Commissioner of the General Land Office reversed it.

5. That the Secretary of the Interior (upon the appeal of Livermore and Bepler) affirmed the Commissioner's decision.

6. And that the plaintiff thereupon paid for the land, received his certificate of purchase, and then the United States patent.

III.

The defendant further charged that in truth and in fact:

1. Geo. Hollingsworth never settled, built a dwelling-house upon, resided upon, cultivated or improved the land, or any part of it, never acquired any right (pre-emption or other) thereto, nor ever even claimed said land as pre-emptor.

2. Said land was not subject to pre-emption at the time of Hollingsworth's alleged settlement, etc., but was part of the Mexican grant, Laguna de la Merced.

3. Said Hollingsworth did not leave either wife or child, him surviving.

4. Said plaintiff did all the acts imputed to him in probate court and in U. S. land office, not for the benefit of Hollingsworth's heirs, but to get the land for himself from the United States "fraudulently and contrary to the laws thereof."

165 In 1873, defendant (fol's 175–185) amended by striking out of his answer and cross-defence all his allegations of the contest between plaintiff, Livermore, and Bepler, before the land officers, Commissioner, and Secretary, (fol's 69–75 and 149–155); also, his allegations (fol's 83 and 163) that he prosecuted the claim with fraudulent intent before the Commissioner and Secretary.

This left (apart from the charge of fraud in probate court, which evidently cuts no figure in the case) only the charges that plaintiff offered testimony before the land officers solely to obtain the title fraudulently and contrary to law; that he paid for the land, and thereupon obtained a certificate of purchase and patent for it; and that the entry should not have been made, because Hollingsworth had not done the acts required to give a pre-emption right, and because the land was not subject—at the time of his alleged settlement, etc.—to pre-emption entry and settlement.

So stood the pleadings at the commencement of the trial, and when defendant first offered in evidence the record of the *Rancho Laguna de la Merced* case, before the Mexican Grant Commissioners, the refusal to admit which is assigned by Department Two of this court as the ground on which the judgment of the district court is reversed.

After that first offer, made (fol. 274) Jan. 13, 1876, and while it was under discussion (fol. 282), the answer and cross-com-

166 plaint were further amended in two points, as shown by the transcript at folios 218–226.

1. By the amendment defendant charges, on his information and belief, that plaintiff, without notice to defendant, produced testimony before the land officers of Hollingsworth settlement and other acts upon the land in dispute down to the time of his death in 1854, and also testimony that said land was, during all that time, subject to pre-emption, and that so Hollingsworth acquired a pre-emption right to the lands.

Whereas, in truth and in fact, said testimony was false, and so known to be by Chapman:

That the land officers, Commissioner and Secretary, were imposed upon by this false testimony, and thereby induced to refuse to allow defendant to file a declaratory statement for the same land, and prove up his claim thereto and pay for it; but, on the contrary, awarded said lots of land to said Benjamin, David, Edwin, and Virginia, heirs of George Hollingsworth.

(It is noteworthy here that these are the persons whose existence defendant still denies at folios 79 and 159.)

III.

It is evident that these charges (without more) give defendant no

equitable defence against the plaintiff's title under the *the* U. S. patent and consequent right of possession; for thus far he
167 does not connect himself, as to this land, with the United States title. Whatever moral turpitude in the plaintiff these charges (if admitted to be true) might show, it would no more give a right of action or defence to the defendant than to any other of the fifty million inhabitants of the United States.

"The missing link" to connect him with the United States, the defendant seeks to supply by further statements of his own acts in regard to this land, which he claims to give him such privity with the U. S. Government, as to entitle him to a decree that plaintiff holds the lands as trustee for him, the said defendant, and that he convey it accordingly.

IV.

The defendant charges in this behalf that in Feb., 1869, he, having the personal qualifications required by law of a pre-emptor, made the settlement and inhabitancy upon the lots in dispute, and did the other acts, required by the U. S. pre-emption statutes to entitle him to enter this land thereunder, except that he did not file his declaratory statement (sec. 5, p. 619, vol. 5, U. S. Stat. at Large) nor make "proof of settlement and improvement thereby required." * * * "to the satisfaction of the register and receiver"—or indeed any proof at all—nor did he pay for the land.

168 He seeks to put himself in the same position as if he had done these things, by alleging that he was ready and offered so to do, but that the land officers refused to receive either his declaratory statement, his proofs, or his money.

Having made these allegations, he claims that he is in such privity with the United States, that he may attack the entry made by the heirs of Hollingsworth.

He claims that he was proceeding so to do in the court below, when his efforts were nipped in the bud by the refusal of the district court to receive in evidence:

1. The record in the grant case, offered to show that at the time of Hollingsworth's alleged settlement thereon, the land in question was within the exterior limits of the *Rancho Laguna de la Merced*, and so not open to pre-emption settlement; and

2. The testimony of I. G. Knowles (fols. 396–8), offered to prove that Geo. Hollingsworth never settled on the land in dispute for himself but for his brother; that he never fenced nor cultivated any part of it; and, in short, that the setting up of a pre-emption claim to said land in the name of George Hollingsworth was, from its inception, a fraud upon the United States.

There were many minor points raised of alleged error, but these cover the whole principle involved, and upon these grounds the decision of the court below, in favor of plaintiff, is reversed by Department Two.

169 The question involved is one of great magnitude in its

bearings upon titles on this coast, and we ask the careful attention of this court thereto.

V.

Of course the only ground upon which a trust can be decreed in this, or any like case, is "*the well established doctrine that where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title.*"

6 Wall. 402, Stark *vs.* Starrs, p. 419.
13 Id. 72, Johnson *vs.* Towsley, p. 85.

It is not the case of the grantor seeking to have a court of equity set aside his deed, or of the United States seeking in such tribunal to have set aside its patent on the ground that it was obtained by fraudulent practices or representations.

In such case it would only be necessary to prove that the instrument was obtained by such fraud; and upon the vacating of the instrument by decree of the court, the title simply revests in the grantor.

In the case at bar, the cases just cited show that it is not only necessary to prove that the plaintiff obtained his patent title by fraud, but also that defendant was himself entitled to the
170 patent from the United States for this land, and would have obtained it if it had not issued to the heirs Geo. Hollingsworth.

And until the defendant shows this, he shows no such connection with the land, or with the United States title thereto, as gives him the right to attack the patent.

VI.

Not only does the defendant fail to show that he was himself entitled to obtain a patent for this land, but he alleges matters which show affirmatively and positively that he *was not and never was* entitled to such patent. He says--

1. That he never filed his declaratory statement, without which filing "within three months from the time of his settlement," his claim is "forfeited."

Section 5 Act of March, 3, 1843, (Vol. 5 Stat. at Large, p. 619, cited *ante*.)

True, his offer to file was made and refused by the land officers; but it was lawfully refused.

By the "act to reorganize the General Land Office," approved July 4, 1836, and by sect. 11 of the pre-emption act of Sept. 4, 1841, as amended June 12, 1858, and sec. 12 of said act, the Commissioner of the General Land Office has the supervision and control of all executive duties pertaining to the sale of the public land, and the prescribing of rules for the making of pre-emption proof, and the trial of pre-emption contests. The rule of the office at this
171 time was (page 100 of transcript) that a third party, whose right commenced during a contest between two other pre-emption claimants—would not, except when specially ordered by

Commissioner or Secretary, be allowed to file his declaratory statement, or take part in the contest. The reason is very clear. If he could so file, and take part—the prior contestants must begin anew and again go over their testimony, that he might make objections to it and cross-examine the witnesses.

Then, after their and his testimony was almost closed, another pre-emption claimant settles and files and takes a hand in the contest. Then all must begin anew once more to give him a chance in this Donnybrook fight. And so on *ad infinitum*. When could a case ever be closed without this rule!

Now look at the dates:

Aug. 3, 1853.—Geo. Hollingsworth's settlement.

Nov., 1854.—His death. (folio 416.)

April 7, 1868.—Township plat filed.

April 8, 1868.—Decl. statement filed in behalf of Hollingsworth's heirs.

Aug. 18, 1868.—Contest commenced in land office between said heirs, Bepler and Livermore (for State of California).

July 28, 1869.—Case finally closed, after having been intermediately (fol. 293) once "stated to be closed," but subsequently reopened for further evidence.

172 In the midst of these proceedings, over five months after the beginning of taking testimony, the defendant, Thomas Quinn, as he claims, made settlement on this land on the fifth day of February, 1869.

Twenty-seven days previously (Jan. 9, 1869) Mr. Quinn had made in 4th district court (fol. 399) his declaration of intention to become a citizen of the United States. Whether he has yet become such citizen, *non constat*.

Within three months from his settlement (it may be as late as May 5, 1869) he offered to file his declaratory statement.

This was refused, as already appears, because a contest for the same land was then pending between three other claimants, and had been for the last nine months and over.

That he was not allowed so to do, and to take a hand in the fight then going on, is assigned by him as an error of the land office, and in substance held by Department Two to be such error.

Defendant also says:

2. That he never made proof "to the satisfaction of the register and receiver" "of the settlement and improvement required by" the act of Sept. 4, 1841.

He says that he was ready to make this proof, had he been allowed so to do, but that the register and receiver would not hear his proofs.

Department Two, in effect, holds that he is in just as good a plight in this action as if he made his proof, for they must hold
173 that he would have been entitled to the land had it not been awarded to the heirs of Hollingsworth in holding that he might attack their patent.

This is the fundamental error of that department in this case; we rest our right of rehearing upon it, and it is so important a matter that we think its consideration deserves a separate paragraph.

VII.

Defendant was not entitled to a patent for this land from the United States, nor could he possibly obtain one upon his present showing, because *he has never made proof*, "*to the satisfaction of the register and receiver*," "*of the settlement and improvement required by the pre-emption act under which he claims.*"

This proof cannot be dispensed with; no other tribunal can be substituted for that before which the law requires this proof to be made.

This court cannot say that any given proof would be "to the satisfaction of" these officers. They may be unreasonable; they may err as to the weight of evidence. (Hosmer *v.* Wallace, 47 Cal., 471.) Still they are the only judges of the facts of settlement and improvement; their decisions on these facts (subject to appeal to the Commissioner and Secretary) are final, and cannot be reviewed by any other tribunal.

The district court might be satisfied with proofs of these facts which defendant might now make—this court might be sat-
174 isfied therewith; but it does not follow that he would have made the same proof to these officers, nor that they would have been satisfied therewith if so made.

The end of the whole matter is that the pre-emption law of Sept. 4, 1841, must be taken together. Section ten gives the pre-emption privilege to persons having the prescribed qualifications and performing the prescribed acts. But section 12 requires that "prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver," etc. So the pre-emption privilege is not granted to *all* the persons described in section 10, but only to those of them who make the proof required by section 12.

This defendant has never made this proof, and so could never pre-empt the land. If the patent had never issued he would not be entitled to enter the land until making this proof. Not having made it, how can he maintain this action when his right to do so depends upon his showing himself to have been better entitled to the patent than was the patentee?

VIII.

Nor is there, in the long list of authorities cited by the learned judge who wrote the opinion adopted by department two, one
175 single case which holds that a pre-emption claimant can maintain an action to have the patentee of land so claimed by him decreed a trustee of such land for his benefit, when he himself has never made his pre-emption proof to the register and receiver.

Not one of these cases holds to so monstrous and unreasonable a doctrine.

In Lytle *v.* Arkansas, 9 How., 327, the U. S. Supreme court held it proven that the ancestor of plaintiff, Nathan Clyoes, did prove his settlement and improvement "to the satisfaction of the register

and receiver," and on that ground reversed the judgment of the State court, dismissing his bill.

The same case, after another trial below, came again before the Supreme Court, in 22 Howard, 193, and the judgment for defendants affirmed, on the ground that Cloyes had imposed upon the land officers by false and fraudulent affidavits, and in fact had not so improved thel and in dispute, the legal title to which was in defendants.

It clearly appears in the first report that the case turned upon the question whether Cloyes had so made his proof, and that the bill would have been dismissed had it not appeared that he did make such proof.

In Cunningham *v.* Ashley, 14 How., 377, the plaintiff, Cunningham, also made his proof before and "to the satisfaction of the register and receiver" of his settlement and improvement. In
176 Barnard *v.* Ashley, 18 How., 43, the complainant made his proof before the register and receiver, who decided in his favor, but their decision was overruled by the Commissioner. The court examined the questions of fact, as to settlement, &c., although there was no allegation of fraud, imposition, or mistake before the land officers. This, the U. S. Supreme Court holds, in Johnson *v.* Towsley, cited *ante*, cannot now be done by a court. In Garland *v.* Wynn, 20 How., 6, both parties made pre-emption proof, paid their money and received certificates of purchase. In Lindsey *v.* Hawes, 2 Black, 554, both contestants made their proof and paid their money. In Minnesota *v.* Bachelder, 1 Wall., 109, the action was by the State, claiming title under the school land grant, to recover possession of a certain section 16, for which the U. S. had issued patents to pre-emption settlers; the State claiming the patents to have been fraudulently obtained, on the claim of parties who were not entitled under the pre-emption laws.

In Stark *v.* Starrs, 6 Wallace, 402—

The complainant, claiming title under the town-site act, brought suit to quiet title against defendant, claiming under *patent* issued to defendant, Stark, under the "donation act," applicable to Oregon.

In Silver *v.* Ladd, 7 Wall., 219—

177 Plaintiff claimed under *Elizabeth Thomas*, who settled on the land under the "donation act" of Congress, concerning Oregon lands.

May 17, 1861, register and receiver issued to Mrs. Thomas under "donation act" *a donation certificate declaring her to have made the proof which entitled her to a patent for the tract which she claimed.*

June 25, 1862, Commissioner G. L. O. set this certificate aside on the ground that Mrs. Thomas *was not the head of a family.*

On appeal to the Secretary of the Interior, this decision was confirmed *on the ground that she was not a settler on the land.* (Her house was half on this land and half on her son's land adjoining.)

Afterwards U. S. patented part of the land to Ladd and part to one Knott.

The U. S. Supreme Court decreed the defendants claiming under U. S. patents, issued subsequently to Mrs. Thomas' certificate of purchase to convey to her grantee, the plaintiff, on the ground that

the Commissioner and Secretary had committed errors of law, the facts being undisputed in Johnson *v.* Towsley, 13 Wall., 72, each party had made proof of payment, and *had received an U. S. patent.*

The case of Comegys *v.* Vasse, 1 Peters, 210, was not a land case. In that case it was simply held that commissioners appointed under a treaty with Spain "to receive, examine, and decide
178 upon the amount and validity of all the claims" described had not power to decide finally what party was entitled to the fund; but that the determination of that question was "left to the ordinary course of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights or equities of all the parties."

Of course that does not apply to this case, where the very question before the special tribunal is, what person is entitled to the benefit of the act?

IX.

Several cases are cited in the opinion to show that land within the exterior limits of, and claimed under a Mexican grant, is not subject to pre-emption entry until excluded by the final survey.

This is elementary law. We have never disputed so simple a proposition, and would hardly be likely to, seeing that the writer of this was the successful attorney in two of the cases cited, to wit: Hosmer *v.* Wallace and Rutledge *v.* Murphy.

What we do claim in the matter is, that—

X.

The question whether the land was subject to pre-emption was a question of fact, decided finally by the register and receiver upon the hearing of Geo. Hollingsworth case.
179 Plaintiff alleged that the officers were imposed upon in this matter by false testimony produced before them by Chapman, to the effect that the land in question was not within said grant, by which these officers were led to believe this, and it was thus subject to pre-emption by Hollingsworth.

When the grant record was ruled out, which was offered in order to prove the land to be within the grant, not one word of evidence had been offered to prove that testimony had been given before the land officers, to prove the land *outside* the grant.

The reason was that no such proof could be made, for no such evidence was ever offered before the land officers. The decision of the register and receiver was *against* Hollingsworth's heirs. (Fol. 335.) So *they* were not misled to defendant's injury.

That of the commissioner, in favor of the heirs, introduced in evidence by defendant, treats the land as being *within the grant* (fols. 322–23;) so that *he* cannot have been imposed upon. This decision just as it was, was affirmed by the secretary. See his letter (fol. 345,) put in evidence by defendant.

So we have the extraordinary spectacle of a new trial granted, because of the refusal of the district court to receive these papers, offered to prove the land within the grant, and thus to help prove

the land officers imposed upon by fraudulent testimony (to
180 the effect that the land was *not* within the grant)—when the commissioner's decision complained of, actually assumes as a fact, that the land *was* within these exterior boundaries of the grant at the time of Hollingsworth's settlement; but that his rights as a pre-emptor were, nevertheless, saved by the act of March 3, 1853, quoted by him!!

But even had this not been so, how could defendant be allowed to prove it untrue that said land was not within the grant, until he had proved *that testimony was introduced before the land officers* to the effect that it was not so within said grant!

This very objection was made at the time (fol. 287;)—"that it does not appear that any evidence whatever upon that point, was offered by said Chapman or the heirs of said Geo. Hollingsworth, before said register and receiver." Was it not a fatal objection?

Must not defendant prove that such testimony was in fact offered before the register and receiver, before he could be allowed to prove that it was false? Until said preliminary proof, the evidence offered was simply and entirely irrelevant. The charge by defendant is, not that the land was not subject to entry by pre-emption; but that the register and receiver were led to believe that it *was* subject to pre-emption by false testimony that it was not within the grant.

If it be said that this would be a mere question of *order of testi-*
money, the answer is, that such order is always within the
181 discretion of the judge; that this very objection was made, (that it was offered out of order,) and so the court below (not presumed to err) will be presumed to have ruled it out upon that ground, if no other of the objections made was tenable.

Conclusion.

So we protest against the judgment of Department Two, and ask a rehearing by the full bench, on the ground that—

1. The plaintiff cannot claim as beneficiary of a trust in this case, because he himself shows that he is not and never was entitled to a patent for the land.

2. The evidence ruled out was offered to prove false certain matters alleged to have been proved by false testimony before the register and receiver without any proof that any testimony on the point was ever offered before those officers.

3. The charge of the cross-complaint is that the land officers were led by false testimony to believe the land in question to be outside of the grant and so subject to pre-emption. The evidence in the record offered by defendant himself shows that the officers believed no such thing; that the register and receivers decided against the heirs of Hollingsworth, and the Commissioner in his decision in their favor, holds that the land was within the grant.

182 4. In no reported case has an action been maintained, or an equitable defence to ejectment been sustained on the ground that the defendant or plaintiff (as the case may be) holds the legal title in trust for the other party because has obtained a title

which in equity and good conscience belonged to that other under the pre-emption laws, except where the party claiming to be the beneficiary of such trust has "made proof of his settlement and improvement to the satisfaction of the register and receiver."

5. Of course all the above reasoning concerning the ruling out of the record in the grant case, applies with equal force to the refusal to receive the testimony of Knowles, so far as it was offered to disprove matters charged to have been proved by false testimony before the land officers. It could not be admissible until some proof that such testimony was given before said officers.

GEO. A. NOURSE,
Attorney for Plaintiff.

Endorsed: Filed April 2, '80. F. W. Gross, clerk. By J. B. Martin, deputy.

183 In the Supreme Court of the State of California.—In Bank.

WEDNESDAY, *April 7th*, 1880.

CHAPMAN *vs.* QUINN. } 5770.

Ordered that this cause be heard by the court in bank.
By the court.

184 *Opinion of the Court in Bank. Filed November* 29, 1880.

CHAPMAN *vs.* QUINN. } No. 5770.

Stripped of the mass of irrelevant and redundant matter found in the record the case presented is this:

One Hollingsworth, it is claimed, settled on the land in controversy in 1853 as public land. He died intestate the following year, and left surviving him a wife and four children. The widow died intestate in 1857. The tract in dispute is composed of lots four, five and six of section thirty-six, in township 2 south, range 6 west of the Mount Diablo base meridian. This township was surveyed and a plat of the survey was made and approved by the United States Surveyor-General for the State of California on the 16th of October, 1863. A certified copy of the plat was on the same day filed in the United States land office at San Francisco, but was soon afterwards withdrawn. On the 19th of March, 1868, an amended plat of said township was made under the authority of said United States Surveyor-General and approved by him, and a copy thereof was filed in the land office, on both of which plats the land in dispute appeared as surveyed public land of the United States.

November 26, 1867, the plaintiff, Chapman, was by the probate court of the city and county of San Francisco appointed administrator of the estate of the deceased, Hollingsworth, and on the 8th of April thereafter letters of administration in the matter of the

estate were issued to him. On the day last named Chapman, as such administrator, filed, on behalf of the heirs of Hollingsworth, in the proper United States land office, a declaratory statement claiming the said premises under the pre-emption laws of the United States, and alleging that Hollingsworth settled upon the land in 1853, improved it, and continued to reside thereon until his death. A contest for the land thereupon arose in the land office between the heirs of Hollingsworth, the State of California, and one Bepler both of the latter being also claimants—Bepler as a pre-emptor. In this contest testimony was begun to be taken by the register and receiver in relation to the right of the heirs of Hollingsworth to enter by pre-emption the land in question on the 18th of August, 1868, and a large amount of testimony was taken therein. The case was finally closed before the register and receiver on the 28th of July, 1869, and resulted in a decision by the register and receiver against the right of the heirs of Hollingsworth to enter the land, and also rejecting the application of Bepler, but awarding the land to the State of California. This decision of the register and receiver was, on appeal to the Commissioner of the General Land Office, reversed by that officer in so far as it rejected the claim of the heirs of Hollingsworth, and awarded the land to the State of California, and affirmed in so far as it rejected the claim of Bepler. An appeal being taken to the Secretary of the Interior, the decision of the commissioner in the matter was affirmed. From which it resulted that the heirs of Hollingsworth were allowed to enter the land, and in due time a patent was issued conveying to them the legal title.

At one stage in these proceedings, to wit, on the 5th day of February, 1869, the defendant, having theretofore declared his intention to become a citizen of the United States, and possessing at the time the qualifications necessary to enable him to pre-empt land from the Government, entered upon the lots in question, which were at the time unoccupied, with the intention of pre-empting the same, and erected a dwelling house and other improvements thereon, and has continued to reside there ever since. Within three months next after his settlement, the defendant for the purpose of acquiring the Government title to the property, under the pre-emption laws, offered to file with the register and receiver of the Land Office his declaratory statement, in due form, and at the same time tendered to the register and receiver the proper fee. Those officers refused to accept or file the statement or to receive the fee, because of a rule then in force in the Land Department forbidding the filing of a declaratory statement based upon an alleged right having its origin subsequent to the commencement of a contest between other parties for the same land. From thus ruling of the register and receiver the defendant appealed to the Commissioner of the General Land Office, where the decision of the register and receiver was affirmed; and from the Commissioner's decision the defendant appealed to the Secretary of the Interior, who affirmed the decision of the Commissioner in the matter.

Thus it will be seen that after a contest between the State of Cali-

fornia, Bepler and the heirs of Hollingsworth, originating before the register and receiver prior to the defendant's settlement, and carried to the head of the Land Department of the Government, the land in controversy was finally awarded, and conveyed by patent, to the heirs of Hollingsworth, while, for the reason already mentioned, the application of the defendant to file his declaratory statement was rejected, and he, consequently, not allowed to become a party to the contest, or to offer any proof before the register and receiver. After the issuance of the patent to the heirs of Hollingsworth, the plaintiff acquired from them an undivided half of the disputed premises and subsequently commenced the present action, which is ejectment, to recover the whole of the property from the defendant. The pleadings on the part of the defendant are unnecessarily numerous and lengthy. They occupy sixty-two pages of the printed transcript, and have entailed upon the court much unnecessary labor in their examination. The substance of them all is, first, an answer denying that the plaintiff has any title to or interest in the lots sued for, but averring that the title thereto is in in the defendant; second, a cross-complaint alleging that the land in question was within the claimed limits of the Rancho *Laguna de la Merced* until the final approval of the survey of that grant, in 1886, which survey omitted the disputed premises from the boundaries of the grant, and left it public land of the United States; that the plaintiff fraudulently designing to obtain the land for himself, procured it to be entered under the pre-emption laws of the United States by the heirs of Hollingsworth, based upon an alleged settlement by Hollingsworth in 1853, and his continual residence thereon until his death in the following year; that the land was not subject to pre-emption at the time of Hollingsworth's alleged settlement, but was part of the Mexican grant already mentioned; that, in fact, Hollingsworth never did settle or reside upon the land in question, and never acquired the right to pre-empt the same, and never claimed such right.

The cross complaint also alleges, at great length, the various proceedings before the officers of the Land Department, the substance of which has been already stated, culminating in the issuance by the Government of a patent to the land to the heirs of Hollingworth, and charges that the testimony introduced before the officers, and upon which the patent was finally issued, was false, and was fraudulently introduced by the plaintiff in pursuance of his alleged fraudulent design to obtain the premises in question for himself. The prayer is that the plaintiff be decreed a trustee for defendant in respect to the property acquired by plaintiff by virtue of his deed from the heirs of Hollingsworth, under the patent from the Government, and that he be compelled to convey the legal title thereto to the defendant.

Respecting the cross-complaint, the first question that suggests itself is, what right has the defendant shown to the title to the land? Of course it is incumbent on him to show that he is, in equity, entitled to the legal title before a court of equity can compel the conveyance of such title to him. So far as any

supposed right on his part is concerned, it is based upon the facts that, pending a contest in the land office between other parties for the land in question, he, the defendant, finding it unoccupied, went upon it on the 5th day of February, 1869, with the intention of acquiring the title to it under the pre-emption laws; that he erected improvements thereon and has continued to reside there ever since, and within three months after the date of his settlement offered to file his declaratory statement with the register and receiver, at the same time offering them the necessary fee, both of which offers were refused by the officers, because, as already stated, the rules of the Land Department at the time required that no such statement should be filed or received after the commencement of a contest between other parties for the same land, and there was then pending in the land office such contest, in which the testimony had been partly taken.

It cannot be doubted that the Commissioner of the General Land Office, subject to the supervision of the Secretary of the Interior, may make rules and regulations, not inconsistent with law, for the government of the various officers in the sale and disposal of the public lands, including rules for the making of the required proof, and the trial of pre-emption contests. And conceding without deciding that where such rules and regulations are *unreasonable*, the courts may interfere, still it cannot be said that the rule forbidding the filing or receiving by the register and receiver of a declaratory statement for a tract of land, after the inauguration of a contest between other parties for the same land, is so unreasonable as to justify such interference. When such contest arises, testimony is taken on behalf of the respective contestants, and each has the right to cross-examine the witnesses of the other. After this has been done, or partly done, to permit a third party to come in and file a declaratory statement for the same land, and thus become a party to the contest, would open anew the controversy and might result in its being kept open to the serious interference with the disposition of the land, and the proper administration of the Land Department. We know of no law, and have been cited to none, contravened by this rule of the Land Office, and we cannot say that the officers of that department of the Government had no power to refuse to receive the declaratory statement of the defendant or to entertain his proofs, upon the facts disclosed by him.

The law under which he claims the right to pre-empt the land in controversy declares, among other things: "That prior to any entries being made under or by virtue of the provisions of this act proof of the settlement and improvement thereby required, shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie," etc. (Act Sept. 4, 1841, sec. 12, 5 U. S. Stat. at Large, p. 456.) This proof it is essential the defendant should make before *he* could be entitled to enter the land; and of this proof the register and receiver are the exclusive judges, subject to the supervision and control of their superior officers of the Land Department. The courts have no power to substitute their judgment upon the facts of the defendant's alleged settlement and

improvement of the land for that of the officers to whose judgment Congress has confided the determination of those questions. Cases are numerous in which the equitable rights of persons claiming under the pre-exption laws have been protected by the courts against the legal title acquired by other parties by means of the introduction of false testimony or other imposition upon the officers of the Land Department, or by the misconstruction by those officers of the law upon an admitted state of facts. But in all of such cases, of which we have any knowledge, the party thus protected had connected himself with the title of the Government and thereby acquired some right which, in equity, entitled him to protection. We know of no case where the holder of the legal title under a patent from the Government has been compelled by a court of equity to convey that title to one occupying the position of the defendant in the present action. To do so would be to compel the conveyance of the title from the grantee of the Government to one who had established no right to purchase the land from the Government itself.

185 Nor do any of the cases cited support the position taken by the defendant.

In Johnson *vs.* Towsley, 13 Wall., 72, Towsley had made his declaratory statement and proved his settlement to the satisfaction of the register and receiver, and they gave him a patent certificate. Johnson contested Towsley's right before these officers and asserted that he was entitled to the pre-emption right for the same land, and when they decided in favor of Towsley he appealed to the Commissioner. This officer approved the decision of the register and receiver, and an appeal was taken by Johnson to the Secretary of the Interior. The latter officer rejected Towsley's claim on the ground that he had previously filed a declaratory statement of his intention to claim a pre-emption for another tract of land, which he had voluntarily abandoned, and consequently awarded the land to Johnson. The court held that the Secretary's construction of the statute upon the subject of the abandonment was erroneous, and directed that Towsley was entitled to a conveyance of the title from Johnson.

In Garland *vs.* Wynn, 20 How., 6, there had been a conflict between two claimants of a right of pre-emption to the same land under different statutes. The register and receiver of the local land office decided in favor of the assignee of Garland and gave him a patent certificate. The Commissioner of the General Land Office approved of the decision, and issued the patent to Garland. Wynn, the other claimant, whose entry was the oldest, and had been once allowed, thereupon filed his bill in equity, asserting his prior right to the land and his equitable title to the patent. The supreme court of Arkansas sustained the bill, and ordered the patentee to execute a conveyance of the land to the complainant, and on appeal the Supreme Court of the United States affirmed the decision.

In Lindsay *vs.* Hawes, (2 Black, 554), the ancestor of the complainant had obtained a pre-emption right to the land in dispute and received a patent certificate for the same. Some years after-

wards the defendant, Hawes, claimed a like pre-emption right to the land, and received a similar certificate, upon which a patent was issued to him. The suit was brought by the heirs of the first pre-emptor to compel a conveyance of the legal title acquired by the patent from the patentee, and parties claiming under him with notice. The Supreme Court of the United States held that the first pre-emptor had acquired the better right to the land, and was therefore entitled to a conveyance of the legal title.

The case of Lytle *vs.* The State of Arkansas (9 How. U. S., 337), is thus stated by the Supreme Court of the United States in the Yosemite Valley case (15 Wall., 90):

"In that case (Lytle *vs.* State of Arkansas) a pre-emptioner by the name of Cloyes claimed a right to make an entry of certain lands under the act of Congress of May 29, 1830. That act gave to every occupant of the public lands prior to its date, who had cultivated any part thereof in the year 1859, a right to enter at the minimum price, by legal subdivisions, any number of acres not exceeding one hundred and sixty, including his improvements, provided the land was not reserved for the use of the United States or either of the several States. It required, before any entries could be made, that proof of settlement or improvement by the claimant should be made to the satisfaction of the register and receiver of the land district, pursuant to rules prescribed by the Commissioner of the General Land Office. Under rules thus prescribed proof was made of the cultivation and improvement of Cloyes, which was satisfactory to the register and receiver, and payment of the price was offered by him. Those officers held that he was entitled to enter one of the fractional sections claimed, the one upon which his improvement was made, and not the others, and issued a certificate to him to that effect. The plats of the township where the land was situated not having been furnished by the surveyor general, as required, the formal entry with the register could not be made, but in lieu thereof, under instructions of the Commissioner of the General Land Office, proof identifying the land claimed was allowed to be filed. The act of 1830 expired in one year, and the public surveys of the land were not completed until December, 1833, and were not returned to the land office until the beginning of 1834. Cloyes had thus done all that he could do to perfect his right to the title of the United States under a law which opened the land for sale in limited quantities, at specified prices, to its occupants and cultivators.

Subsequently, in July, 1832, Congress passed an act giving to parties entitled to pre-emption under the act of 1830 one year from the time when the township plats should be returned to enter the lands. Under this act the heirs of Cloyes, he having died, made payment to the receiver for the fractional section to which his pre-emption claim was allowed in 1830, as already stated, and also for the fractional sections to which his claim was rejected, and applied to the register to enter them, but that officer refused to allow the entry. The court held that, so far as the fractional quarter section to which the claim was allowed by the register and receiver in 1830 was concerned, the refusal did not affect the right of the claimant.

And it is with respect to the inability of Cloyes to make the entry in 1830 for want of township plats which the surveyor general had failed to return, and the refusal of the register to allow the entry subsequently, under the act of 1832, that the language cited by counsel was used by the court, namely, that 'It is a well-established principle that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. In this case, the pre-emption right of Cloyes having been proved, and an offer to pay the money for the land claimed by him under the act of 1830, nothing more could be done by him under that act. And subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being returned, he could do nothing more than to offer to enter the land, which the register would not permit him to do. This claim for pre-emption stands before us in a light not less favorable than it would be if Cloyes or his representatives han been permitted by the land officers to do what in this respect was offered to be done,'" and the court in the Yosemite case say there is no question about the correctness of the doctrine there announced.

It is unnecessary to refer in detail to all of the cases which it is said sustain the position of the defendant. Those already referred to are the ones to which most weight seems to have been attached, and the wide distinction between them and the case at bar is sufficiently apparent. It is enough to say that in no case to which we have been referred has relief in the nature of that here sought been granted to one who, like defendant, has never filed a declaratory statement, never made proof of settlement, never paid any money, never received any certificate or other recognition from the officers of the Land Department, but who went upon the premises after the inauguration of a contest between other claimants to the same land, and at a time when by the rules and regulations then in force in that department he had no right to file a declaratory statement, and consequently no right to make proof or payment—in short, no right to pre-empt the land. In our opinion not only has the defendant failed to show such paramount equities as would justify a decree compelling the conveyance to him of the title conveyed by the patent from the Government, but he does not occupy a position entitling him to be heard to question the proof upon which the officers of the Government acted in awarding the patent to the heirs of Hollingsworth. It is not pretended that the patent is absolutely void. If, as is asserted by the defendant, it was procured to be issued by the introduction of false and fraudulent evidence before the officers of the Land Department, it is unquestionably voidable at the suit of the Government or any person in privity with the paramount source of title, but not at the instance of a stranger to that title as is the defendant. (Doll *vs.* Meador, 16 Cal., 295; Burrill *vs.* Haw, 40 Cal., 377: Rhodes *vs.* Craig, 21 Cal., 423; Stark *vs.* Starrs, 6 Wall., 418.)

Entertaining these views, it is not necessary to inquire whether the action of the court below can be sustained on other grounds.

For the reasons already stated we think the judgment and order should be affirmed, and it is so ordered.

ROSS, *J.*

We concur:

McKINSTRY, *J.*
MORRISON, *C. J.*
SHARPSTEIN, *J.*
McKEE, *J.*
MYRICK, *J.*

Dissenting Opinion.

I cannot concur with my associates in their judgment in this case. Since reading the opinion of the court I have re-examined the case fully, and that re-examination satisfies me that the conclusion reached in the former opinion is correct, and that my associates have fallen into errors which will result in great injury to the rights of litigants, and that the conclusions reached by them are contrary to all the decisions of courts in such cases, so far as any have been cited to us, or that I have been able to find.

The rule upon which one of the points was decided in the former opinion, is this: That when the officers of the United States Land Department decide controverted questions of fact, *in the absence of fraud, or imposition, or mistake*, their decisions on such questions are final, except as they may be reversed on appeal in that department; but that where, on the application of the facts as found by such officers, they *by misconstruction of the law* take from a party that to which he has acquired a legal right under the sanction of the law, a court of equity can give relief.

This rule is taken almost *verbatim* from the opinion of the court by Miller, J., in Johnson *vs.* Towsley, 13 Wall., p. 86. This case was a re-examination of the former cases on the subject. It is so stated by the able jurist who drew up the opinion in the case cited.

It is thus stated: "The contest arises out of rival claims to the right of pre-emption of the land in controversy. The register and receiver, after hearing these claims, decided in favor of Towsley, the complainant, and allowed him to enter the land, received his money, and gave him a patent certificate. On appeal to the commissioner of the Land Office their action was affirmed, but on a further appeal to the Secretary of the Interior, the action of these officers was reversed on a construction of an act of Congress, in which the Secretary differed from them, and under that decision the patent was issued to Johnson.

"It will be seen by this short statement of the case that the rights asserted by complainant, and recognized and established by the Nebraska courts, were the same which was passed upon by the register and receiver, by the commissioner and by the Secretary of the Interior, and we are met at the threshold of this investigation with the proposition that the action of the latter officer, terminating in the delivery to the defendant of a patent for the land, is conclusive of the rights of the parties not only in the Land Department, but in the courts and everywhere else.

"This proposition is not a new one in this court in this class of cases, but it is maintained that none of the cases heretofore decided extend, in principle, to the one before us; and the question being pressed upon our attention with an earnestness and fullness of argument which it has not, perhaps, before received, and with reference to statutes not heretofore considered by the court, we deem the occasion an appropriate one to re-examine the whole subject." (13 Wall., p. 81.)

Two points were then discussed. The first is based on the acts of Congress in relation to proceedings in the Land Department; the second on the general doctrine "that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others."

The point first mentioned above was that by virtue of the provisions of the 10th section of the act of June 12, 1858, (11 Stats. at Large,
186 326) amending the 11th section of the general pre-emption law of 1841, the decision of the Commissioner of the General Land Office on appeals in cases of contest between different settlers for the right of pre-emption shall *be final* unless an appeal be taken therefrom to the Secretary of the Interior. After examining the various acts of Congress bearing thereon, the conclusion reached is thus stated: "In the use of the word *final*, we think nothing more was intended than to say that, with the single exception of an appeal to his superior, the Secretary of the Interior, his decision should exclude further inquiry in that department. But we do not see, in the language used in this connection, any intention to give to the final decision of the Department of the Interior, to which the control of the land system of the Government had been transferred, any more conclusive effect than what belonged to it without its aid." (13 Wall., p. 83.)

After stating that the court finds no support to the proposition of the counsel for the plaintiff in error in the special provisions of the statute relied on (which has been just above stated,) the court proceeds to discuss the second proposition, and concludes that the argument is much stronger when based on the general doctrine expressed in it. Admitting that under the principle above set forth, that the action of the land office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the *legal title*, and in all courts and in all forms of judicial proceedings where the legal title must control, either by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained, the learned jurist proceeds thus:

"On the other hand there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or

modified, and patents and other important instruments issuing from the crown or other executive branch of the Government have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle." (13 Wall., 84.)

The opinion then proceeds to show particularly why such rules should apply to the United States Land Department, in these words:

"In dealing with the public domain under the system of laws enacted by Congress for their management and sale, that tribunal decides upon private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influence of frauds, false swearing, and mistakes."

These are among the most ancient and well established grounds of the special jurisdiction of courts of equity just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the land office. It is very well known that these officers do not confine themselves to determining, before a patent issues, who is entitled to receive it, but they frequently assume the right, long after a patent has issued and the legal title passed out of the United States, to recall or set aside the patent, and issue one to some other party, and if the holder of the first patent refuses to surrender it they issue a second. In such a case as this, have the courts no jurisdiction? If they have not, who shall decide the conflicting claims to the land? If the land officers can do this a few weeks or a few months after the first patent has issued, what limit is there to their power over private rights? Such is the case of Stark *vs.* Starrs (6 Wall., 402), in which the patent was issued to one party one day and to the other the day after, for the same land. They are also in the habit of issuing patents to different parties for the same land, containing in each instrument thus issued a reservation of the rights of the other party. How are those rights to be determined except by a court of equity? Which patent shall prevail, and what conclusiveness, or inflexible finality, can be attached to a tribunal whose acts are in their nature so inconclusive? So also the register and receiver, to whom the law primarily confides these duties, often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Undoubtedly this constitutes a vested right, and it can only be divested according to law. In every such case, where the land office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been done in violation of law, and if it has, to give appropriate remedy." (13 Wall., 85.) And then proceeds to state the general rule as follows; "And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from United States to one party, when, in equity and good conscience, and by the laws which Congress has made on the sub-

ject, it ought to go to another, 'a court of equity will,' in the language of this court in the case of Stark *vs.* Starrs, just cited, 'convert him into a trustee of the true owner, and compel him to convey the legal title.' In numerous cases this has been announced to be the settled doctrine of this court in reference to the action of the land office. Lytle *vs.* Arkansas, 22 Howard, 192; Garland *vs.* Wynn, 20 Id., 8; Lindsey *vs.* Hawes, 2 Black, 559." (13 Wall., 85.) After stating with reference to cases that the same doctrine had been applied in Kentucky, Virginia, and Pennsylvania, which States had a system of land sales, and that several of the Kentucky cases cited had come to the United States Supreme Court, where the principle had been uniformly upheld, the learned judge remarks that: "It is said that the present case does not come within any of the adjudicated cases on the subject; that in all of them there has been some element of fraud or mistake, on which the cases rested." (13 Wall., p. 86.)

We think it proper to say here that this point was urged and this concession made by a learned lawyer and jurist, Judge Lyman Trumbull of Illinois, it is hardly to be supposed that so eminent a lawyer as Judge Trumbull would have made such concession unless it was in conformity with the acknowledged adjudications of the courts, or it was manifest on principle.

The opinion then proceeds in relation to the point thus stated, and the concession of the advocate, and states the rule we have referred to:

"Undoubtedly there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this court does not and never has asserted that all the matters passed upon by the land office are open to review in the courts. On the contraray, it is fully conceded that when those officers decide controverted questions of fact in the absence of fraud, or impositions, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when, in the application of the facts as found by them, they, by mis-construction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief." (13 Wall., p. 86.)

It will thus be seen that the learned counsel for the plaintiff in error, and the able and distinguished court, speaking through Mr. Justice Miller, concede the point as correct, laid down in the opinion of Department 2, in regard to fraud or imposition or mistake in relation to controverted questions of fact, and cites two of the cases referred to in that opinion, and adds another from 2d Black. The case of Johnson *vs.* Towsley turned on a question of law, held to be improperly decided by the Secretary of the Interior in awarding the land to Johnson, reversing the decisions of the register and receiver and the Commissioner of the General Land office. It is stated in the opinion that this very point had been decided (that the courts would correct mistakes of law by the officers of the land department) in Minnesota *vs.* Batchelder (1 Wall., 109), and Silver *vs.* Ladd (7 Id., 219), and states the facts in Silver *vs.* Ladd and the decision of

the court, and then proceeds as to the respective functions of the officers of the land department and the courts as follows:

"This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government, and in reference to the proceedings before the officers intrusted with the charge of selling the public land, it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand it has constantly asserted the right of the proper courts to inquire, after the title has passed from the Government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the land department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law." (13 Wall, p. 87.)

The opinion then continues in a discussion of the particular facts of the case before the court, and affirms the judgment of the court below in favor of Towsley, the complainant, on the ground that an error or mistake in law had been committed by the Secretary of the Interior in deciding in favor of Johnson. Johnson was thus held a trustee for Towsley, and ordered to convey to him. Clifford, J., dissented, and put his dissent on the distinct ground that the decision of the land officers was final, "except in cases of *fraud or mistake* not known at the time of the investigation by the land department." (13 Wall., p. 91.) Davis, J., took no part in the decision.

It will thus be seen that all the judges but one participated in the decision, and all agreed that in case of *fraud*, the ordinary courts of justice, competent to try such questions of fraud, had jurisdiction. The only difference of opinion was as to decisions on questions of law.

I cannot see how it can be controverted that such fraud or imposition or mistake relates to matters of fact. If that is not the *meaning* of the opinion in Johnson *vs.* Towley, then a greater part of the opinion is *meaningless*.

This rule was held to be in accord with the judgments of the courts in cases formerly decided. (13 Wall., 81, 85—on latter page citing three cases.) It has been since repeatedly adhered to by the same court in the cases following: (Samson *vs.* Smiley, 13 Wall., 91; Warren *vs.* Van Brunt, 19 Wall., 653: Shepley *vs.* Cowan, 91 U. S. R., 330; Moore *vs.* Robbins, 96 U. S. R., 530; Marquez *vs.* Frisbie, 101 U. S. R., 473.) In relation to this rule, Field, J., delivering opinion of the court in one of the above-cited cases, says: "If the matter were open for our consideration, we might perhaps doubt as to the sufficiency of the proofs presented by the heirs of Chartrand to the officers of the Land Department to establish a right of pre-emption by virtue of the settlement and proceeding of their

ancestor. Those proofs were, however, considered sufficient by the register of the local land office, by the Commissioner of the General Land Office on appeal from the register, and by the Secretary of the Interior on appeal from the Commissioner. There is on evidence of any fraud or imposition practiced upon them, or that they erred in the construction of any law applicable to the case. It is only contended that they erred in their deductions from the proofs presented, and for errors of that kind, where the parties interested *had notice of the proceedings before the Land Department, and were permitted to*
187 *contest the same*, as in the present case the courts can furnish no remedy. The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, *or they themselves are chargeable with fraudulent practices*, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested election case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the President. It may also be, and probably is, true that the courts may furnish, in proper cases, relief to a party where new evidence is discovered, which, if possessed and presented at the time, would have changed the action of the land officers; but, except in such cases, the ruling of the department on disputed questions of fact made in a contested case must be taken, when that ruling is collaterally assailed as conclusive." (91 U. S. R., 339, 40.)

This was said in regard to the *facts*—"the sufficiency of the proofs." In Warren *vs.* Van Brunt (opinion by Waite, C. J., whole court concurring) the rule is stated with regard to the facts: The *record* did not disclose the facts found by the officers. The court, however, considered the facts as found by the court. This was done, no doubt, to see whether there was any error of law by the court, as the court found there was no fraud or unfairness or misconduct. (19 Wall., 652–3.) Moore *vs.* Robbins came before the court on a writ of error to the supreme court of Illinois. That court held the decision of the Land Department conclusive on the courts. Their judgment was reversed, and the rule is stated as appears above. It is expressly stated in laying down the rule that "as to the facts on which their decision is based (referring to the decision of the Land Department) in the absence of *fraud* or *mistake*, that decision is conclusive," etc., which is no doubt the same as saying that where there is *fraud* or *mistake* as to the facts, their decision is not conclusive. It is further stated that in such cases courts of equity have "jurisdiction *to correct mistakes, to relieve against frauds and impositions*," etc. (96 U. S. R., 535.) In Marquez *vs.* Frisbie, the jurisdiction of the court was admitted, but it was decided on the grounds that there was no sufficient allegation of mistake in law or of fraud and imposition. The cause was tried in the

court below on a demurrer to the complaint, which was sustained, and the plaintiff declining to amend, judgment was rendered for defendant. The cause came before the United States Supreme Court on a writ of error to the supreme court of this State, which court had affirmed the judgment thus rendered on demurrer. The jurisdiction was invoked both on the ground of mistake in law and fraud and imposition as to the facts, and the jurisdiction of the court was admitted, but held not to have erred in refusing to exercise it on account of the defects in the averments in the complaint.

The cases before Johnson *vs.* Towsley are numerous: Comegys *vs.* Vasse, 1 Pet., 212; Lytle *vs.* State of Arkansas, 9 How., 328; Cunningham *vs.* Ashley, 14 Id., 377; Barnard *vs.* Ashley, 18 Id., 44; Garland *vs.* Wynnn, 20 Id., 6; Lytle *vs.* Arkansas, 22 Id., 192; Lindsey *vs.* Hawes, 2 Black, 554; O'Brien *vs.* Perry, 1 Black, 139; Minnesota *vs.* Batchelder, 1 Wall., 109; Stark *vs.* Starrs, 6 Id., 402; Silver *vs.* Ladd, 7 Id., 219. In the opinion of Miller, J., in Johnson *vs.* Towsley, it is twice expressly or by implication stated that the judgments in these cases are not departed from in the ruling in that. (13 Wall., 81–85.)

We have cited above *seventeen cases* in all from the U. S. Supreme Court, with the rulings in which the opinion of the department in this case accords. It is unnecessary to refer to the opinions in the circuit courts which are in like accord.

Hosmer *vs.* Wallace (47 Cal., 461) states the rule as above and cites Johnson *vs.* Towsley. The rule is twice stated approvingly in the opinion of the court, on page 471 and again on 473. The same rule was stated as law in Hess *vs.* Bollinger (48 Cal., 353), and in Burrell *vs.* Haw (Id., 225). In Rutledge *vs.* Murphy (51 Cal.. 391), the court was asked to review Hosmer *vs.* Wallace, as unsupported by reason or authority, and in conflict with Warren *vs.* Van Brunt, (19 Wall., 646). The court did not do so, stating that the judgment must be affirmed on other grounds, saying: "But we are not to be understood as admitting by implication the incorrectness of that decision, which was founded on the authority of Johnson *vs.* Towsley." (51 Cal., 391.)

In Dilla *vs.* Bohall (53 Cal., 710) no question of fraud or imposition was involved, but a mere question of law. The same may be said of Powers *vs.* Lith (53 Cal., 712). The defendant's entry (No. 304) on which he succeeded was not attacked for fraud. If the court intend to hold in the two cases last cited that the decisions of the Land Department on questions of fact, where they are properly alleged to be false and fraudulent, and to have imposed on the officers of that department in making their decisions, are not subject to review by the courts, they are opposed to the rulings in Hosmer *vs.* Wallace and Hesse *vs.* Bolinger, and the numerous decisions of the U. S. Supreme Court above cited. This I do not think they intended to do.

In the complaint in this case the defendant alleges fraud and imposition upon the officers of the Land Department by the parties under whom the plaintiff claims, and makes all other necessary averments to make out his case. They are fully stated in the opinion of

the Department, and it is unnecessary to repeat them here. Does he not also allege an error in law by the same officers, in setting out that the land was within the limits of a Mexican grant when Hollingsworth's settlement was made, and that the land was not then subject to pre-emption, and was not so subject until the final survey of the grant was approved in 1866? It may be added here that the demurrer to the amended answer and cross-complaint was overruled.

The cross-complaint shows clearly that the defendant is in equity entitled to a conveyance from the plaintiff. The error of the court below was in not allowing him to establish the averments of the cross-complaint. The offers to prove the allegations were competent under the pleadings. They were excluded, and those rulings are the errors assigned. To hold that because a contest was pending between other parties for the land, and, therefore, the defendant should not be allowed to bring his case before the proper officers, would be as reasonable as to sustain the action of a court who had held that a party could not sue to recover a tract of land on the ground that an action was then pending in the court between other parties for the same land.

The register and reciver refused to allow the defendant to file his declaratory statement and make proof and payment (all of which he offered to do) on the ground "that the rules of the Land Department at that time required that no such statement should be filed or received after the commencement of a contest between other parties for the same land," and there was then pending in the Land Office such a contest in which the testimony had been partly taken.

It is not contended that the defendant did not have a right to file his statement, except for the reason just above stated. He did, in fact, bring himself within the law. (See act of Congress of 1841 in relation to pre-emptions, 5 U. S. Stats., §§ 10, 11, 12, 13, 14, 15, and act of 1853, extending the provisions of this act in relation to pre-emptions to State of California.)

The 10th section of the act of September 4, 1841, provides that from and after the passage of that act that such a person as the plaintiff is admitted to be, who has made a settlement on the public lands which have been surveyed, and who shall inhabit and improve the same, and erect a dwelling-house thereon, is authorized to enter with the register of the proper land office, by legal subdivisions, any number of acres not exceeding one hundred and sixty. The provisions of the 12th section will be found below in this opinion, and need not be inserted here. The 13th section prescribes an oath to be taken by a person claiming the benefit of the act, to the effect that he has never had the benefit or any right of pre-emption under the act, that he is not the owner of three hundred and twenty acres of land in any State or Territory, etc. This oath is admitted to have been taken. No question is made concerning it, and, therefore, no further reference need be made to it. By the 15th section of the same act it is provided that whenever any person shall settle and improve a tract of land, *subject at*

the time of settlement to private entry, and shall intend to purchase the same under the provisions of this act, such person shall within thirty days next after the date of such settlement file with the register of the proper land district a written statement describing the land settled on, and declaring his intention to claim the same under the provisions of this act, and shall, where such settlement is made after the passage of the act, within twelve months after the date of such settlement, make the proof, affidavit, and payment required by the act, and if he fails to file the statement referred to, or make proof and payment within the time prescribed as each, the tract of land so settled on and improved shall be subject to the entry of any other purchaser.

Where the settlement is on land not subject to private entry the declaratory statement is required by the fifth section of the act of March 3, 1843, (see 5 U. S. Stats. at Large,) within three months from the time of settlement, where such settlement is made after the passage of the act. (See on construction of the acts of Congress on this point, Johnson *vs.* Towsley, 13 Wall., 88–9.)

These sections are referred to to show that the right to enter is personal to the settler (10th section), as is the right to make proof (12th section), and the right to file the declaratory statement (section 15). The 12th section requires expressly that prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improvement thereby required shall be made, etc. Here the settler is required to make proof, and by the 15th section to make it within twelve months after settlement. Can any officer, whether register or receiver, or Commissioner, or Secretary of the Interior, make any rule or regulation which would debar a settler of a right thus vested in him by act of Congress? Would not such a rule or regulation be repugnant to the acts of Congress above mentioned? The mere statement of the question furnishes the answer, and demonstrates that such rule or regulation would be of no force.

It would be surprising to find *in the state of the law as above set forth*, that any officer of the United States was invested with a power to deny a party a hearing upon a claim presented by him, as prescribed by congressional enactment. After a hearing, such officer might decide adversely to the claim set up, but certainly he could not deny a hearing. This has been done here, and it is sanctioned by the judgment of this court. There is a limitation of the power to make rules and regulations, defined in the *acts of Congress.* The power comes primarily from the twelfth section of the statute of 1841, in relation to pre-emption rights (see 5 U. S. Statutes at Large, 456; Lester's Land Laws, 62), which is in these words: "That prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie, agreeably to such rules as may be prescribed by the Secretary of the Treasury, who shall each be entitled to receive fifty cents from each applicant for his services, to be rendered as aforesaid, and all as-

signments and transfers of the right hereby secured, prior to the issuing of the patent shall be null and void."

By the act of Congress of 3d of March, 1849, establishing the Home Department (Interior) the duties then discharged by the Secretary of the Treasury in relation to the General Land Office were assigned to the Secretary of the Interior. (See 3d section of this act, Lester's Land Laws, 151.)

188 The rules and regulations referred to in the act of 1841 (12th section) were, after the passage of the act of 1849, framed by the Secretary of the Interior instead of the Secretary of the Treasury. Though in fact framed by the Commissioner of the General Land Office, they are in law framed by the Secretary of the Interior, as they are made in his Department and under his supervision.

By the act of July 4, 1836, it was provided (see 1st section of act, 5 U. S. Stat. at Large, 107), that from and after the passage of that act the executive duties now prescribed, or which hereafter may be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such lands, and also such relate to private claims of land, and the issuing of patents for all grants of land under the authority of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States. The act of 1849, above referred to, substituting the Secretary of the Interior in place of the Secretary of Treasury, in all matters connected with the Federal Land Department, gave the former officer a supervision and control over the Commissioner above mentioned—the Secretary being under the supervision and control of the President.

But the limitation in the 12th section of the act of 1841, as to the rules applied to all of the officers above named, whether Commissioner or Secretary or President, and this must be so, since the whole power as to the public lands is in Congress, and it alone is vested with authority to make all needful rules and regulations concerning them. (Const. U. S., Art. IV., sec. 3; Parken *vs.* Duff, 47 Cal., 561–2 *et seq.*, and cases cited; Wilcox *vs.* Jackson, 13 Pet., 516; U. S. *vs.* Fitzgerald, 15 Id., 421; Frisbie *vs.* Whitney, 9 Wall., 192.)

The language of the provision of the Constitution of the United States referred to is this: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Now, what is the authority given by Congress? It is comprised in the words used in the 12th section of the act of 1841, above cited, "that prior to any entries being made under and by virtue of the provisions of this act, proof of the settlement and improvement," etc., "shall be made to the satisfaction of the register and receiver" * * * "agreeably to such rules as shall be prescribed" by the Secretary of the Interior. The section then proceeds to fix the compensation to the register and receiver for the services rendered in regard to such proof.

The limitation referred to in regard to such rules and regulations to be prescribed is as to the proof, not to the refusal to allow such proof. The proof is to be made under *such rules and regulations*, and no where is any officer of the United States authorized to make rules denying a party the right to make such proof prior to the entry of the land. As was said by Attorney General Butler on this subject: "The Commissioner is merely to prescribe rules conformably to which the proof is to be made. *The proof itself is indispensable.*" (3d Opinions of Attorney General, p. 127.) It may be that such rules and regulations may be made disallowing such proof after an entry has been regularly made. But this question is not before us, as the application here was made before any entry was made or could be made.

The rules and regulations having to be made as to the proof, it does not apply to filing the declaratory statement. This statement is filed under a right allowed by the *acts of Congress*, and no officer is authorized to decline to receive it, at any rate, before entry. The right to file such statement is given by the acts referred to, and the officers of the Land Department could no more refuse to receive it than the board of commissioners could refuse to receive a claim for a grant from the Mexican authorities under the act of 1851, when presented within the period fixed by law. In fact, the declaratory statement is but the filing of a claim. It determines nothing, and is of no avail until established by the proof required by law.

If, then, a party has a right to file his claim, he has a right to make proof. The one is a consequence of the other. It is a matter of no consequence that other parties have commenced to make proof. The authority given by the 12th section of the act of 1841 applies to each person who presents his claim. That person has such right. It is given to him by law. To hold that this right is cut off, or can be cut off by rule that the claim cannot be presented or proof made after some evidence has been taken in a contest between other parties, is in derogation of the acts of Congress, and is a denial of a right given by such acts. Such ruling concedes to the officers the right to dispense with the law; in other words, to legislate. This power cannot be exercised by officers of the Executive Department.

The officers of the Land Department are no where allowed to deny a party the right to present his claim. These rules only refer to the proof, and not to the presentation of the claim. Nor can they refuse to receive the proof. They can make rules, etc., as to the proof offered, but this power does not include the right to deny to a claimant the opportunity of offering it.

The settler upon public land, complying with the conditions of the law, has a right to file his declaratory statement until an entry has been made. (See opinion of Attorney General Mason, 1 Lester's Land Laws, etc., 380; of Secretary of the Interior, Id., 395, 407, 415, 417.) In Daniels *vs.* Diggs, the acting secretary held that the law allowed a pre-emption claimant thirty days from the date of his settlement to file for offered land, and three months for

unoffered land, and no entry thereof, before his application to file, if within the legal time, will not debar him of his right. (1 Lester's L. L., 418–19.)

The offer to file the declaratory statement, pay all fees, and make proffer of payment, as was done by defendant, placed him in a condition to demand his rights here under the law. This is sustained by the decision of the Supreme Court of the United States in Lytle *vs.* State of Arkansas. (9 How., 333, and the Yosemite Valley case, 15 Wall., 91.) The rule is thus stated: "It is a well-established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." In this case the pre-emption right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being returned, he could do nothing more than to offer to enter the land, which the register would not permit him to do. This claim for pre-emption stands before us in a light not less favorable than it would if Cloyes or his representatives had been permitted by the land officers to do what in this respect was offered to be done." (9 How. U. S., 333.)

Field, Justice, in the Yosemite case, commenting on what is above cited, said: "There is no question about the correctness of the doctrine here announced; it is only a familiar principle which is stated, that where one offers to do everything upon which the acquisition of a right depends, and is prevented by fault of the other side, his right shall not be lost by his failure." (15 Wall., 91.)

It is but an application of the principle embodied in the maxim that equity considers that as done which ought to have been done.

The just interpretation of this rule is that when a person has done all in his power to obtain what he is entitled to, and he is defeated by the wrong or neglect of a public officer, he is considered as holding the same position to have his rights determined as if all had been done. (Story's Eq. Jur., sec. 64, g.)

The defendant does not seek here to enter the land, but asks to be permitted to show that another person has by fraud and imposition been allowed to enter it, and has procured that which he ought to have. He therefore asks the plaintiff be held a trustee for him, and be compelled to convey to him the title which he has thus unjustly acquired. It is no answer to the application of the defendant to the courts that he has never made any proof in the Land Office of his right to enter the land. He could not make any. He was illegally deprived of his right to make proof. For that reason he applies to a court of equity. This very circumstance gives him standing in court. On this very point, in Johnson *vs.* Towsley, this language is used as to the rulings of the Supreme Court of the United States: "It has constantly asserted the right of the proper courts to inquire, after the title has passed from the Government, and the question become one of private right, whether, according

to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another." (13 Wall., 87.) The same doctrine is clearly laid down in Shepley *vs.* Cowan and Moore *vs.* Robbins, above referred to. If the courts have no jurisdiction in such a case as this, where the defendant has had no hearing at all, where is his remedy? If the allegations of his complaint are true he is entitled to the land. He has had no hearing in the Land Office. If it is held that he has none in the courts, what remedy has he? The courts have no right to interfere while the matter is before the officers of the Land Department, and those officers are discharging their duties, in any way whatever, so long as the title remains in the United States. But when the title has passed from the Government, the aid of courts can be invoked, as we have above pointed out. (13 Wall., 87.) The defendant has sought his remedy in the proper quarter by seeking redress from the courts. If he is denied a hearing in the courts, his cause is decided against him without any hearing at all.

The case under consideration is the same as that presented in Hollingshead *vs.* Simms, 51 Cal., 159. In that case the register and receiver refused to allow Simms to file his declaratory statement because the land had been certified over to the State. Simms made no proof in the Land Office. The grantor of Hollingshead had procured a patent from the State to which the land has been listed as university land. This court reversed the judgment of the court below and ordered a conveyance to be made by Hollingshead to Simms, on the ground that by fraud and perjury Simms had been deprived of that to which he was in equity entitled. It does not appear that it ever occurred to counsel or court that Simms must adduce proof of some kind before the land officers, and, that in case he did not the courts could afford him no relief.

In this case, where the defendant has done all that it was in his power to do, this court holds that he is bound by a determination, where he was not a party and not allowed to be a party, nor in privity with either party. His claim is not investigated, and though he may have the title, his rights are determined adversely to him without a hearing. In reality it is held that though he may have the better right to the land in question, and has done all he could to assert it, he is concluded without any hearing whatever by any tribunal.

The proceedings before the Land Department were entirely *ex parte*, and therefore the authorities above cited apply with the greater force. The defendant was not heard at all. The determination of the land officers cannot, therefore be held in any way conclusive as to the rights of the defendant. There is no determination binding on defendant on any question of fact or law.
189 Though the officers referred to did hold in the case before them that the land in controversy was at the time (1853) of the alleged settlement of Hollingsworth public land and not a part of the rancho Languna de Merced, this determination was had in the absence of the defendant, and should not be regarded as in the

least affecting him. If the land sued for was in 1853 a part of the rancho Languna de Merced, when the settlement of Hollingsworth was alleged and is found to have been made, as the claim for it was then pending before the tribunals of the United States for adjudication, it was not subject to pre-emption, and the heirs of Hollingsworth could derive no benefit from such settlement. Trenouth *vs.* San Francisco, 100 U. S. Rep., 251 ; Page *vs.* Fowler, 37 Cal., 105.

For the foregoing reasons I am of opinion that the court below erred in excluding the testimony offered as to the rancho Laguna de Merced, and the offer to make proof by Knowles that Hollingsworth never made any settlement on the land in question ; that the conclusions reached by Department No. 2 are correct, and that the judgment should be reversed and the cause remanded for a new trial.

THORNTON, *J.*

190 In the Supreme Court of the State of California.—In bank.

MONDAY, *November 29th*, 1880.

WILLIAM S. CHAPMAN, Plaintiff and Respondent,
vs.
THOMAS QUINN, Defendant and Appellant. } No. 5770.

On Appeal from the District Court of the 19th Judicial District, in and for the City and County of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Ross, J.; McKinstry, J.; Morrison, C. J.; Sharpstein, J.; McKee, J.; Myrick, J., concurring; special dissenting opinion, Thornton, J.

Whereupon, it is now considered, ordered, adjudged, and decreed by the court here, that the judgment and order of the district court of the 19th judicial district, in and for the city and county of San Francisco in the above entitled cause, be and the same is hereby affirmed with costs.

191 *Bond.*

In the Supreme Court of the United States.

THOMAS QUINN, Plaintiff in Error,
vs.
WILLIAM S. CHAPMAN, Defendant in Error.

Know all men by these presents, That we, William H. Keith and Gideon H. Brown, both of the city and county of San Francisco, State of California, are held and firmly bound unto the said defendant in error, William S. Chapman, in the sum of five hundred dollars United States gold coin to be paid to the said William S. Chapman, his executors or administrators. To which payment well and truly

to be made, we bind ourselves and each of us jointly and several-
192 ly, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated this third day of December, A. D. 1880.

Whereas, the above-named Thomas Quinn has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of California in the cause entitled William S. Chapman, plaintiff, *versus* Thomas Quinn, defendant.

Now, therefore, the condition of this obligation is such, that if the above-named Thomas Quinn shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

Dated at San Francisco, this third day of December, 1880. Witness our hands and seals.

W. H. KEITH. [SEAL.]
G. H. BROWN. [SEAL.]

193 UNITED STATES OF AMERICA, DISTRICT OF CALIFORNIA, } *ss:*
City of San Francisco, County of San Francisco, }

William H. Keith and Gideon H. Brown, being duly sworn, each for himself, deposes and says that he is a freeholder in the district and State of California, and is worth the sum of one thousand dollars in United States gold coin over and above all his debts and liabilities in property exempt from execution.

W. H. KEITH.
G. H. BROWN.

Subscribed and sworn to before me this 3d day of December, A. D. 1880.

[SEAL.]

J. B. MARTIN,
Deputy Clerk of Supreme Court.

Endorsed: The form of the within bond and the sufficiency of the sureties thereon are hereby approved. Dated Dec. 3d, 1880. R. F. Morrison, chief justice of supreme court of State of Cala.

Endorsed: Filed December 3d, 1880. F. W. Gross, clerk. By J. B. Martin, deputy.

194 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said supreme court before you between Thomas Quinn, plaintiff in error, and William S. Chapman, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly

corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 3d day of December, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth.

Attest, &c.:

[SEAL.]

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *D'p'y Cl'k.*
Of U. S. Circuit Court, District of California.

The above writ of error is hereby allowed.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

195 *The Answer of the Justices of the Supreme Court of the State of California.*

The record and proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

Witness the Hon. R. F. Morrison, chief justice of the supreme court of the State of California, this twelfth day of July, A. D. one thousand eight hundred and eighty-one.

By the court:

[SEAL.]

FRANK W. GROSS,
Clerk of Supreme Court of the State of California.

Endorsed: United States Supreme Court. Thomas Quinn, pl'ff in error, *vs.* William S. Chapman, def't in error. Writ of error. Filed December 3d, 1880. F. W. Gross, clerk. By J. B. Martin, deputy.

196 UNITED STATES OF AMERICA, *ss:*

To William S. Chapman, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1881, pursuant to a writ of error, filed in the clerk's

office of the supreme court of State of California, wherein Thomas Quinn is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that bedalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of December, A. D. 1880, and of the Independence of the United States, the 104th.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

197 Due service of the within and foregoing citation on this 4th day of December, 1880, is hereby admitted, at San Francisco, district of California.

GEO. A. NOURSE,
Attorney for Defendant in Error.

DISTRICT AND STATE OF CALIFORNIA, *City and County of San Francisco.* } *ss:*

Daniel Brennan being duly sworn deposes and says, that he is a citizen of the United States, above the age of 18 years, and is not a party to the above entitled action, that he received the annexed citation in the foregoing entitled action on the 4th day of December, A. D. 1880, and personally served the same upon William S. Chapman, the therein named defendant in error, on the 6th day of December, A. D. 1880, by delivering to and leaving with him, said defendant in error, personally, in the city and county of San Francisco, a copy of said citation, and then and there showing to him the original thereof. DANIEL BRENNAN.

Sworn to before me this 6th day of December, A. D. 1880.

[SEAL.] J. B. MARTIN,
Deputy Clerk of Supreme Court of California.

Endorsed: United States Supreme Court. Thomas Quinn, pl'ff in error, *vs*, William S. Chapman, def't in error. Citation. Filed December 6th, 1880. F. W. Gross, clerk. By J. B. Martin, deputy.

198 In the Supreme Court of the State of California.

THOMAS QUINN, Pl'ff in Error,
vs.
WILLIAM S. CHAPMAN, Def't in Error.

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that I have compared the foregoing transcript, comprising pages No. 1 to 194, inclusive, with the original papers in the above-entitled action now on file in my office and with the orders therein made and entered on the minutes of said court, and that said transcript is correct, and that the writ of error, page 194, and citation and service, page 195, are the original, and that the same together constitute the return to the said writ of error.

In witness whereof, I have hereunto set my hand and affixed the seal of the supreme court of the State of California this 13th day of June A. D. 1881.

[SEAL.] FRANK W. GROSS, *Clerk.*
By C. HARLAN, *Deputy Clerk.*

[Endorsed on cover:] California supreme court. No. 286. Thomas Quinn, plaintiff in error, *vs.* William S. Chapman. Filed 3 September, 1881.

111-445

FILED
MAR 28 1884
J. H. McKINNEY, CLERK

No.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

WM. S. CHAPMAN,

Defendant in Error,

VS.

THOS. QUINN,

Plaintiff in Error.

Brief for Plaintiff in Error.

Points and Authorities.

S. W. HOLLADAY,

Attorney for Plaintiff in Error.

Recd a copy of this Brief
this day of March 20, 1884

Geo. A. Nourse
Atty for Deft in E

SAN FRANCISCO:
STANLEY & DAVIS, BOOK AND JOB PRINTERS, 543 CLAY STREET.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

WM. S. CHAPMAN,
Defendant in Error,
vs.
THOS. QUINN,
Plaintiff in Error.

Brief for Plaintiff in Error.

For a full statement of the case the Court is respectfully referred to this case as reported in the 56 California reports, at pages 266 and 278, which is hereby expressly referred to and prays that the same may be taken as a statement herein.

I.

The Court below erred in sustaining the objections made by said defendant in error to the admission in evidence of the record of the U. S. District Court for California, of proceedings upon the claim of Josefa de Haro and others against

the United States (being Docket No. 380 of that Court) for the "Rancho Laguna de la Merced," and in rejecting said record, and the evidence to show that the land in dispute was a part of said claim; said record and evidence having been twice offered by said defendant during said trial and rejected by the Court.

Transcript, folios 275 and 408.

Said evidence, if admitted, would have shown that the "pre-emption right," *asserted* by the defendant in error have been acquired by George Hollingsworth in his lifetime and to have been inherited by his children, under prentence and by assertion of which the said Chapman obtained the U. S. patent given in evidence by him, was a *false pretence*, and never had any existence in fact; and followed, as it would have been, by proof of the evidence which was given by said Chapman before said Register and Receiver, would have shown that the setting up of that pretence, and the obtaining of said patent by means thereof was the obtaining of it by a *fraud* and *imposition* upon the U. S. land officers, who must have believed said pretence *true*, or they would never have awarded and issued said patent to said Chapman in the *name of the heirs of said Hollingsworth*.

This evidence, if admitted, would have brought this case precisely within the principles of that of Garland *vs.* Wynn, 20 Howard, U. S., 6–8 and, as was done in that case, would have presented the question whether "the *Courts of justice have power* to examine a contested claim to a right of

entry under the pre-emption laws, and to overrule the decision of the Register and Receiver, confirmed by the Commissioner, in a case where they have been imposed upon by *ex-parte* affidavits, and the patent has been obtained by one *having no interest secured to him in virtue of the pre-emption laws* to the *destruction* of *another's right* who had a preference of entry which he preferred and asserted in due form, but which right was *defeated by false swearing* and *fraudulent contrivance* brought about by him to whom the patent was awarded."

In that case the Court laid down the proposition, (which has ever since been followed), that "the *general rule* is, that where several parties set up conflicting claims to property, with which a *special* tribunal may deal *as between one party and the Government*, regardless of the rights of others, the *latter may come in the ordinary courts of justice* and *litigate* the conflicting claims." And the Court adds: "Nor do the regulations of the Commissioner of the General Land Office, whereby a party *may* be heard to prove his better claim to enter, *oust the jurisdiction of the courts of justice.*" And the Court still further adds: "We announce this to be the *settled doctrine* of this Court. It was, in effect, so held in the case of Lytle *vs.* The State of Arkansas, (9 How., 328), next, in the case of Cunningham *vs.* Ashley, (14 How.,), and again in the case of Bernard *vs.* Ashley, (18 How., 44.)"

See also upon same point:

Cunningham *vs.* Ashley, 14 How., U. S., 385, 388.

Lindsey *vs.* Hawes, 2 Black, 554, 556, 557.

Minnesota *vs.* Bachelder, 1 Wallace, 109. 111, 115.

Johnson *vs.* Towsley, 13 Wallace, 72, 81, 87.

Warren *vs.* Van Brunt, 19 Wallace, 646.

Moore *vs.* Robbins, No. 256, decided by the U. S. Supreme Court, Oct. T. 1877; published in Copps' Land Owner, vol. 5, No. 3, page 37.

II.

Land included within a Mexican "claim" filed before the U. S. Board of Land Commissioners, was not "public land," and no "pre-emption rights" whatsoever could be acquired thereto until *after*, by final survey, it had been *excluded from such* "claim."

Prior to that time, such land being "reserved by competent authority," any "settlement" thereon with a view to "pre-emption" was expressly *prohibited* by law.

Cornwall *vs.* Culver, 16 Cal., 429.

Mahoney *vs.* Van Winkle, 21 Cal., 578.

Act of Congress of March 3d, 1853, "To provide for the survey of the public lands in California," etc., Secs. 6 and 7, 10 U. S. States, p. 246.

Newhall *vs.* Sanger, 2 Otto, U. S. Rep., 763-4-5.

Van Reynegan *vs.* Bolton, 5 Otto, U. S. Rep., 36.

Rutlege *vs.* Murphy, 51 Cal., 393, 394, 395.

Taylor *et al vs.* California, Copps' Land Laws, p. 330, 333.

Opinion of Secretary Thompson, 1 Lester, p. 425, (No. 485.)

Upon *proof*, such as was offered by the plaintiff in error, in the present case, this Court *decided*, in the case of Mahoney *vs.* Van Winkle et al., that this same Mexican grant, called "Laguna de la Merced," consisting of "*half a league*" of land, "within boundaries containing a much larger quantity," was *never segregated* from such larger quantity until the decree of the U. S. Supreme Court in said case of Josefa De Haro and others *vs.* The United States, made at its December Term, 1865, effected a *substantial*, though not an *exact* segregation.

Mahoney *vs.* Van Winkle, 33 Cal., 453, 454, 455, 456,

III.

The lots in controversy were *subject to preemption* at the time the plaintiff in error settled upon them, because at *that* time the Mexican "claim" had been removed from them, and it is expressly "*admitted*" by the parties to this action that "the title to them *never vested in the State.*"

Trans., folio 274.

Moreover, Township 2 South, Range 6 West, Mt. Diablo base and meridian, being a *fractional*

township a large portion of it being covered by the Pacific Ocean, and there being, for that reason, no Section 16 therein, nor any Section thirty-six, nearly the whole of what, if it had been surveyed, might have constituted Section thirty-six, being "taken by private claims," there was an "impediment" which *prevented* the title to any Section 16 or 36 from vesting in the State upon the U. S. survey of said Township being made.

The *amount* of land, if any, to which the State was *entitled* under the Federal School land grant, on account of such *fractional township*, had *first* to be *ascertained* by the action of the *Federal* authorities at least, if not in *conjunction* with those of the *State*. After the *amount* of school land for said Township had been so ascertained or agreed upon, the right of the State was "to select" such amount, which "selections" had to be "approved by the Secretary of the Interior."

The State was not bound to select or accept, the *water fractions* of what, if it had been surveyed, *would have been* Section 36, as any part of its school land for that Township.

Opinion of U. S. Att'y-Gen'l Berrien, 2 Op. Att'y-Gen'ls, p. 360, 362.

Opinion U. S. Att'y Gen'l Nelson, 4 Op. Att'y-Gen'ls, p. 322.

Act of Cong. of March 3, 1853, "to provide for the survey of the public lands in California," etc., Sec. 7, 1 Foster, p. 207.

Act of Cong. of July 23, 1866, "to quiet land titles in California," Secs. 6 and 8, 2 Lester, p. 181.

Cooper *vs.* Roberts, 18 How. U. S., 179.

The *part* of a 16th or 36th Section which would be "settled upon by a pre-emptor," or taken by private claims" would, of course, always be the most valuable part of such Section, leaving the balance of *inferior* quality, and often, *refuse* land.

IV.

The "declaratory statement" tendered by the plaintiff in error, to the Register of the U. S. Land office at San Francisco, was in time, and ought to have been received and filed.

Shafer *vs.* Scheibel, Copp's Land Laws, p. 292.

Conroy *vs.* Phillips, Copp's Land Laws, p 297–8.

Aurrecochea *vs.* State of Cal., 2 Copp's Land Owner, p. 19.

Taylor *vs.* State of Cal., 2 Copp's Land Owner, p. 19.

Having done everything that he could do in the assertion of his right as pre-emptor to said land, plaintiff in error's right thereto has not been lost or prejudiced.

Cunningham *vs.* Ashley, 14 How., U. S., 388.

Kile *vs.* Tubbs, 23 Cal., 442–443.

Robinson *vs.* Forrest, 29 Cal., 329.

The Court below, also, erred in sustaining said defendant in error's objections to the proof offered

by said plaintiff in error to be made by his witness, J. G. Knowles, to the effect, in substance, that *George Hollingsworth never settled on* the land now in dispute for himself; that he *never fenced nor cultivated any part of it*; that whatever he did upon said land was *done for his brother, B. S. Hollingsworth;* that *all that was done* upon said land, was the *enclosing of the same by the said B. S. Hollingsworth*, and that the setting up of a "pre-emption claim" to said land in the name of said George Hollingsworth, deceased. was, from its inception, a *fraud* upon the United States.

Trans., folios 396 to 399.

The "pleadings" *did* "justify" this evidence; for the plaintiff in error's answer and cross-complaint averred "that in truth and fact the said George Hollingsworth *never did* in his life time, *settle, build a dwelling-house*, or *reside upon, cultivate* or improve said three lots of land, or any of them, or any part thereof;" and said defendant in error's answer to said cross-complaint averred "that said George Hollingsworth *did*, in his lifetime, to wit: in the fall of the year 1853, *settle, build a house*, and *reside upon*, and did *cultivate* and improve the said lots of land mentioned in the complaint."

Trans., folios 77, 157, 209.

Said evidence was not, therefore, either "irrelevant, immaterial" nor "incompetent," but, on the contrary, was relevant, material and competent.

VI.

The case stated by the plaintiff in error, in the third defence of his answer, and in his cross-complaint, if proven, will entitle him to the judgment and relief which he asks.

Hollingsworth *vs.* Simms, 51 Cal., 158.
Lynch *vs.* Brigham, 51 Cal., 491.
Campbell *vs.* Buckman, 49 Cal., 362.
Lytle *vs* State of Arkansas, 9 How., U. S., 328, 329, 333.
Gaines *vs.* Nicholson, 9 How., U. S., 364.
Garland *vs.* Wynn, 20 How., U. S., 6–8.
Barnard's Heirs *vs.* Ashley's Heirs. 18 How., U. S., 45, 46.
Cunningham *vs.* Ashley, 14 How., U. S., 382, 383.
Lindsey *vs* Hawes, 2 Black, 555, 563,
Minnesota *vs* Bachelder, 1 Wallace, 115.
Johnson *vs.* Towsley, 13 Wallace, 72
Samson *vs.* Smiley, 13 Wallace, 91, 92.
Warren *vs.* Van Brunt, 19 Wallace, 652.
Norton *vs.* Green, 21 Wallace, 662.
O'Brien *vs* Perry, 1 Black, 139.
Meador *vs.* Parsons, 19 Cal., 294.
Kile *vs.* Tubbs, 23 Cal., 442, 443.
Terry *vs.* Megerle, 24 Cal., 625.
Robinson *vs.* Forrest, 29 Cal., 320.
Bird *vs.* Wilcox, 45 Cal., 686.
Hess *vs.* Bollinger, 48 Cal., 352.

Since the decision of the present case of Chapman *vs.* Quinn, by the Supreme Court of Califor-

nia, the same tribunal has in effect reversed that decision in the case of Carr *vs.* Quigley.

57 Cal. Rep. p. 395.

(Please see it.)

S. W. HOLLADAY,
Att'y for Plaintiff in Error.

S. W. Holladay
"
Atty for Plff in Error

111-445

FILED
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JAMES H. McKENNEY
CLERK.

IN THE

Supreme Court United States.

THOMAS QUINN,
Plaintiff in Error,

vs.

WM. S. CHAPMAN,
Defendant in Error.

October term, 1883, No. 286.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERROR.

BARCLAY HENLEY,
of Counsel.

IN THE

Supreme Court United States.

THOMAS QUINN,
Plaintiff in Error,

vs.

WM. S. CHAPMAN,
Defendant in Error.

October term, 1883, No. 286.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Wm. S. Chapman, defendant in error, brought action in the 19th District Court, city and county of San Francisco, against Thomas Quinn, the plaintiff in error, to recover possession of certain premises described as lots 4, 5 and 6 of section No. 26, of township No. 2 south, range 6 west Mount Diavlo base and meridian. The complaint was in ordinary form, which under the Code of California, has, in that State, succeeded to the common law declaration in ejectment. It alleges that plaintiff was seized in fee of an undivided moiety of the premises, and that defendant was in possession thereof and detained the same to plaintiff's damage. (Transcript p. 1.)

To this complaint the defendant filed an answer and cross-complaint (pp. 1–27.) under section 442 of the Code which authorizes an equitable defence to be thus asserted, and if found valid, to be affirmatively sustained by the judgment.

The answer denied all the allegations of the complaint. The cross complaint alleged in substance:

First; That the premises were excepted from all sale and alieniation by the United States from March 14, 1852, to March 19, 1868, because claimed, *sub judice*, to be within the rancho "Luguna de la Merced."

Second; That the State, otherwise entitled under the school grant, had, in consequence of such claim, selected and procured title to other lands in lieu of the whole of said section, the premises in controversy thereafter remaining and being public land subject to pre-emption.

Third; That thereafter, to wit, February 5th, 1869, defendant being in all respects qualified and finding the land vacant, settled upon the same as pre-emptor, complied with all the provisions of law and in proper time applied to file declaratory statement which was rejected by the Register and Receiver, and also upon appeal by the Commissioner of the General Land Office and Secretary of the Interior; that he subsequently repeatedly applied to make proof of his compliance with law and to pay for the land without success, although at all times entitled so to do under tne law.

Fourth; That shortly after the final establishment of the boundaries of the said Luguna de la Merced grant and the exclusion therefrom of the premises in controversy, the plaintiff Chapman, fraudulently and by false testimony and pretenses procured for his own benefit the allowance of a filing upon said land, in the name of said Chapman as administrator, based upon a fraudulent and

false allegation of settlement by one George Hollingsworth, deceased, in August 1853; that by these proceedings the officers of the land department were deceived and misled into rejecting defendant's applications as aforesaid; that patent had since issued upon said fraudulent proceedings to "The heirs of George Hollingsworth," who had, however, prior to the patent, attempted to convey an undivided half interest to said Chapman, by virtue of which deed, solely, plaintiff sought to recover; that Hollingsworth never, in fact, settled or resided upon said land and never claimed the same under the pre-emption law; that the land was not at any time during the life of said Hollingsworth, subject to pre-emption by anyone, and that plaintiff had no title except the one thus fraudulently obtained.

Answer to this cross complaint (pp. 30–34) having been filed, the cause, by consent, was tried by the court without a jury, findings of fact filed and judgment thereon entered for the plaintiff. Thereupon defendant gave notice of a motion for a new trial, to be based upon a statement of the case to be prepared and settled by the court, on the grounds of irregularity in proceedings of the court, accident and surprise, insufficiency of evito justify decision and errors of law excepted to at the trial. (pp. 40–41.) The court thereupon settled an engrossed statement of the case, (pp. 41–70) covering all proceedings at the trial; the motion for new trial thereon was overruled and exception taken (p. 70) and defendant appealed to the Supreme Court of the State (pp. 70–74). The Supreme Court (Department No. 2) upon hearing thereof, reversed the judgment below and the order denying the motion, and remanded the case for a new trial. (pp. 74–85.) Thereupon, on petition

of plaintiff, the cause was reheard in court in banc and after argument the judgment of the District Court was affirmed. (pp. 96, 103–116; see dissenting opinion pp. 103–116.) The defendant then sued out his writ of error in this court and the case now comes here for review.

Assignment of Errors.

The general assignment of errors, which it is alleged were committed by the court below, is found in the engrossed statement of the case upon which the motion for new trial is based, at pages 68, 69 and 70 of the transcript. Certain of these errors are also specially assigned for consideration in the brief of Mr. S. W. Holladay already filed. To these we add, as more particularly pertinent to the branches of the case which we propose to discuss, the following:

The Supreme Court of the State erred—

First. In deciding that plaintiff in error, the defendant in the suit below, was not, upon the facts disclosed by the record, in such a position as to invoke the equitable relief prayed for.

Second. In not remanding the case to the inferior court for new trial, and admission of certain evidence, offered, rejected and excepted to, as follows:

(a) The record of the United States District Court, in the matter of the proceedings on confirmation and survey of the Rancho Laguna de la Merced and the evidence to show that the land in controversy was a part of said claim.

(b) The testimony of the witness J. G. Knowles, to the effect that Hollingsworth never settled upon or claimed the land under the pre-emption law.

Brief.

Before proceeding to discuss the above alleged errors of the court below, we briefly advert to certain preliminary questions raised by the brief of counsel for defendant in error.

1. It is said that the errors of the *nisi prius* court complained of in the rejection of proffered testimony are not properly before this court for review, because the record contains no bills of exception.

The proposition of counsel is that the statement of the case, settled by the *nisi prius* court, setting up all the proceedings at the trial including all proffers, rejections and exceptions which legitimately formed the basis of review by the Supreme Court of the State, is legally insufficient when the case reaches this court upon writ of error, notwithstanding it is found in the transcript as part of the record, and so returned in answer to the writ. There is no denial of the fact that this statement truthfully presents the questions raised; that it in form correctly raised all such questions in the Supreme Court of the State under the code of practice; and that the whole record comes to this court precisely as it was passed upon by the Supreme Court of the State.

The criticism is solely upon the *form* of its appearance in the record now under review. It is claimed that when the case left the Supreme Court of the State, another and difierent rule prevailed from that which, to that time, had properly governed its presentation.

The motion for new trial upon a settled statement of the case, setting up all that occured during the trial and relied upon as error, is a common, expeditious and convenient mode, adopted by the Code for reviewing all questions leading up to the judgment. It supplies the

place in ordinary practice of the bill of exception, (especially where trial is had before the court without a jury) and it is legally sufficient to to raise all such questions in the appellate tribunal. It not only embraces all questions of discretion, such as the insufficiency of the evidence to sustain the verdict or judgment, but also all errors in the rulings of the court upon the admissability of testimony. This will not be denied and it is not questioned by the learned counsel. In fact, the remedy for review in such a case in the Supreme Court of the State is by *appeal* and not by writ of error.

If, as counsel states in his brief, the errors cognizable under a writ of error, one only such as lead "up to the judgment," then the writ in the case at bar covers the errors set out in the "statement," for that not only led up to the judgment of the Supreme Court, here under review, but was literally all the court had before it, setting out or alleging errors. It was literally the record itself.

The Code of Civil Proceedure of 1872, sections 657 to 661, provides for motions for new trial. Section 657 enumerates as one of the grounds for such motion;

"Error in law occurring at the trial and excepted to by the party making the application."

Section 661 provides that immediately after deciding the motion the court shall file a statement in writing, under his hand, embracing all the antecedent proceedings and then provides:

"And the statement as made and filed constitutes and has *all the force and effect of a bill of exception to the order granting or refusing the motion.*"

And in a foot-note the author adds:

"If the new trial is moved for, then the papers used at the hearing, are, by the judge, turned into a bill of exception, and constitute the *only record* on appeal from a decision granting or refusing the motion."

By the amendment to the Code of 1873–4, section 568 of the original was so amended as to provide that motions for new trial upon errors of the court occurring during the trial, might be made:

"At the option of the moving party, either upon the minutes of the court, or a bill of exception, *or a statement of the case*, prepared as hereinafter provided."

And by subsequent sections, (659, paragraph 3, 660 and 661) the statement so prepared constitutes the record before the appellate tribunal. Section 661 expressly provides:

"The judgdment roll and affidavits, the bill of exception, *or statement*, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal, from the order granting or refusing a new trial, unless the motion be made upon the minutes of the court, and in that case the judgment roll, and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal."

In this appears that the means adopted in the case at bar, was a proper, legitimate and effective remedy for raising the quesions of law arising at the trial; and the course followed was in accordance with the strict letter of the code of civil procedure.

However the question is not a new one in this court and involves no new question or practice. This court always recognizes and follows the practice of the State court in matters of this kind and if any qnesjion reaches the ultimate State court, in proper form for trial and decision there, it is in proper form when brought to this court, by

writ of error or appeal, as the case may be. This is well settled, and so far as we know has never been questioned in all the cases brought to this court from California by writ of error, bringing up just such records.

2. It is said that the court had no jurisdiction to ascertain the question raised by the cross complaint; because it would be an interference by the State of California, with the primary disposal of the public domain by the United States.

The United States has exercised its primary right to dispose of the public domain when it has once issued its patent. That act passes the legal title out of the United States and into the patentee. Concede that prior to such a patent the authority of the State cannot be invoked to control or guide the disposition of the land by the United States, *non constat* that the State may not afterwards, through its judiciary, charge the patentee as the trustee of the person equitably entitled. That would not be interfering with the primary disposal of the land. It would be sujecting the land *after* such complete disposal to such charges as the law prescribed.

The United States by its patent primarily disposed of this land to the heirs of Hollingworth. If this were not so, the plaintiff Chapman, would have no title. The fee would be in the United States. As it is Chapman has the legal title by virtue of this primary disposal. The United States has fully exercised its reserved right; has disposed of the land, and the title thereafer, like all other titles and property rights, falls under the operations of general laws and the jurisdiction of local courts in similar cases.

The jurisdiction of a State court to thus recognize the right of the equitable owner, as against the patentee, is

acknowledged by this court in *Bagnell* vs. *Broderick*, *13 Peters*, *451*, and is necessisarlly within the meaning of the long list of authorities hereinafter referred to in sustaining such a jurisdiction in the courts of the United States.

Passing now to the consideration of the assignments of error, as above, we have the honor to submit the following suggestions.

FIRST ASSIGNMENT.

We say that the court erred in deciding that under the facts disclosed by the record, that the defendant in error was not in a position to assert his claim to equitable relief as against the plaintiff, holding under the patent.

The facts shown by the record as the basis of the equitable relief prayed for by the defendant Quinn, are in substance as follows:

Chapman, on the 8th day of April 1868, as the administrator of George Hollingsworth, filed in the Register's Office a declaratory statement for these tracts, alleging a settlement, &c., by said Hollingsworth, in the year 1853. Hollingsworth died in 1854. His widow, surviving, died in 1857, in Missouri, leaving three children, neither of whom in 1853, 1854 or afterwards, had any connection with the land. Thereupon a contest arose before the local officers, between said Chapman, one Bepler claiming as a preemptor, and the State of California and testimony was commenced to be taken on the 18th day of August 1868, and continued from time to time until July 28, 1869. The case was decided by the local officers in favor of the State: was appealed to the Commissioner of the General Land Office, was, by the Commissioner decided in favor of the Heirs of Hollingsworth, which decision, was, upon appeal affirmed by the Secretary of the

Interior. Patent then issued to the Heirs. Chapman, in the case at bar, claimed under a conveyance by said heirs executed prior to the patent. Quinn was not a party to any of these proceedings.

During their pendency, however, and during the time when evidence was being taken by the local officers, viz: on the 5th day of February 1869, Quinn, being a qualified pre-emptor, and entitled to enter lands under the pre-emption laws, finding the lands entirely vacant and unoccupied, entered upon the same with intention of pre-empting them, erected a dwelling house and other improvements and has since continuously resided on, cultivated and improved the same, as required by the pre-emption laws.

Within three months after his said settlement (the period allowed by law) and before the proceedings above referred to were closed at the local office, he applied to the register to file a declaratory statement for the premises. His application was rejected by the local officers on the ground that under a rule of the General Land Office, it could not be received pending the other contest. Quinn appealed to the Commissioner, who sustained the decision of the Register and Receiver. He then appealed to the Secretary who affirmed the Commissioner's decision and upon an application for rehearing adhered to his first decision. There was no reason assigned or existing, in fact, for these orders or decisions except the rule of the office referred to. Quinn subsequently and in due time applied to pay for and enter the land and was refused. He has at all times been ready to prove his full compliance with all provisions of the law and has repeatedly attempted to do so.

Quinn alleged in his answer and cross complaint that the premises in question were, at all times from 1852 to

1868, reserved from pre-emption filing and appropriation by reason of their being included within the claim, *sub-judice*, of the rancho Laguna de la Merced. He offered to prove this by the record of the proceedings for confirmation and segregation of said rancho, which offer was twice made, rejected and excepted to. The cross complaint also alleged that said Hollingsworth never settled upon or claimed said tracts under the preemption law and this he offered to prove by the testimony of Knowles, rejected and exception reserved. The cross complaint also alleged fraud on the part of Chapman in all the proceedings above recited to his (Quinn's) prejudice, in the rejection of his application to file and perfect title to the land.

The Supreme Court of the State decided that under this state of fact, Quinn was not in a position to maintain a demand in equity against Chapman, holding under the patent, and charge him as trustee, because he, Quinn, had not connected himself, with the title of the United States "and thereby acquired some right which in equity, entitled him to protection," (p. 100.) This position necessarily includes and embraces two antecedent ones, viz: that the Commissioner of the General Land Office had jurisdiction and power to prescribe the rule referred to and that Quinn had not done all that was legally necessary to connect himself with the paramount title.

This decision of the Supreme Court of the State of California can be defended neither by reason nor by the authorites. If any principle has ever been thoroughly settled by the decisions of this court, it is this: that although the judgements and decres of inferior courts of limited jurisdiction are final and conclusive upon all matter of fact, yet that where such courts by misconstruction of the law have denied the substantial equitable rights

of individuals, recourse may be had to courts of equity to charged the holder of the legal title with a trust in favor of the person entitled.

This is a well recognized and established principle sustained by many authorities.

It is conceeded in the case at bar that no land included within the claim limits of a Spanish or Mexican grant, *pendent lite* is subject to preemption. Counsel for defendent in error admits this in his petition for rehearing filed in the Supreme Court of the State (see page 94 of the transcript). Speaking of this question he says; "several cases are cited in the opinion to show that land within the exterior limits of, and claimed under a Mexican grant, is not subject to preemption entry until excluded by the final survey. This is elementary law. We have never disputed so simple a proposition, and would hardly be likely to, seeing that the writer of this was the successful attorney in two of the cases cited."

It may therefore for the purpose of this discussion be taken as conceeded that if the allegations of the cross complaint are true, then the land in controversy was not subject to preemption at the date of Hollingsworth's alleged settlement. Tnis settlement was said to have been made in 1853, and the allegation of the cross complaint is that from the years 1852 to 1868 these tracts were all within the claimed limits of the Rancho Laguna de la Marced.

That lands so situated are not subject to pre-emption has also been directly decided by thi court.

Newhall *vs.* Sanger, 92 U. S., 763–4–5;
VanReynegan *vs.* Bolton, 95 U. S., 36.

And the Supreme Court of California in the following cases by:

Cornwall *vs.* Culver, 16 Cal., 459;
Rutledge *vs.* Murphy, 51 Cal., 393, 394, 395.

The record of the proceedings upon confirmation and segregation of the Rancho Laguna de la Merced, was offered in evidence and rejected. Other testimony was offered proving, or tending to prove, that the premises in controversy were during the years mentioned, included within said claim. The pleadings and the rejected testimony establish a case excluding the possibility of any valid pre-emption right having been established by Hollingsworth, in 1853, or during his lifetime. It follows, that upon the segregation of these tracts in 1868, the land became public land of the United States, and was subject to the pre-emption claim of Quinn. The legal title of the United States having passed to the heirs of said Hollingsworth, the party not entitled thereto under the law, equity can be resorted to to compel the present owner of said title to hold the same as trustee for Quinn to whom the title should have been issued.

We rely upon the case of Johnson *vs.* Towsley, 13 Wall., p. 36, as absolutely conclusive of the right of the defendant in error to maintain his cross-bill. This case was elaborately argued and thoroughly considered, and the opinion announced was an exhaustive review of all the law upon this subject from the earliest date. It arose under the land system and related to rival pre-emption claims. The court speaking by Miller, Justice, after referring to the general principle that the decisions of courts of limited jurisdiction are conclusive upon matters of fact, then said:

"On the other hand there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice and wrong,

in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown or other executive branch of the Government have been corrected or declared void, or other relief granted. No reason is perceived why the action of the Land Office should constitute an exception to this principle."

And again:

"And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases the legal title has passed from the United States to one party when in equity aad good conscience, and by the laws which Congress has made on the subject, it ought to go to another; a court of equity will, in the language of this court in the case of Stark *vs.* Starr, just cited, 'convert him into a trustee of the true owner, and compel him to convey the legal title.'"

And again:

"This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the Government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands, it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand it has constantly asserted the right of the proper courts to enquire, after the title has passed from the Government and the question become one of private right, whether according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the land department are not only founded

upon a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law."

The principle announced in this decision had been previously determined by the following cases:

Comegys *vs.* Vasse, 1 Pet. 212;
Lytle *vs.* Arkansas, 9 How., 328;
Cunninghan *vs.* Ashley, 14 Id. 377;
Barnard *vs.* Ashley, 18 Id., 44;
Garland *vs.* Wynn, 20 Id., 6;
Doyle *vs.* Kansas, 22 Id. 192;
Lindsey *vs.* Hawes, 2 Black, 554;
O'Brien *vs.* Perry, 1 Black, 139;
Minnesota *vs* Bachelder, 1 Wall., 109;
Stark *vs.* Starrs, 6 Id. 402;
Silver *vs.* Ladd, 7 Id. 219;

And it has been repeatedly adhered to in subsequent cases.

Samson *vs.* Smiley, 13 Wall., 91;
Warren *vs.* VanBrunt, 19 Wall., 653;
Shepley *vs.* Cowan, 91 U. S. R. 330;
Moore *vs.* Robbins, 96 U. S. R., 530;
Marquez *vs.* Frisbie, 101 U. S. R. 473.

In the light of these authorities the right of the defendant, Quinn, must be conceded unless there is something which makes his case an exception to the general rule. The only suggestion of this kind found in the record is that contained in the opinion of the Supreme Court of the State which holds that he is not so entitled because he has failed to connect himself with the paramount source of title. In other words, that he is not in a position to claim this relief because he has not made proof of his claim to the satisfuction of the register and receiver. To defend this position, it is necessary to say

first, that the rule of the General Land Office upon which his applicrtion to file was rejected, was a binding regulation, having the force and efficacy of law, second, that Quinn has not done all that the law required him to do in order to connect himself with the paramount source of title.

The right to file a declaratory statement upon public lands of the United States is one given by law. Any qualified citizen having previously made a settlement upon any unappropriated portion of che public domain, has the legal right to acquire a title thereto by certain subsequent proceedings, commencing with the filing of a declaratory statement and ending with proof of residence, cultivation improvement, and payment for the land. This is a right which is garanteed and protected by the law and one which cannot be denied except under and by virtue of law.

No regulation of any executive officer preventing or interfering with the exercise of such a right can be considered of any possible validity. While it may be admitted that the Commissioner of the General Land Office under the supervision of the Secretary of the Interior, has the right to prescribe rules and regulations for the administration of public land laws, it cannot for a moment be seriously contended that such a power embraces the right to declare a general statute of the United States inapplicable under any peculiar state of affairs or conditions. Such a regulation or rule would be legislation, would repeal of an act of Congress, would deny to an individual a right guaranteed by statute. If as a matter of fact, any rule of the General Land Office prohibited the allowance of Quinn's declaratory statement at the time when he offered it, the lands being public lands of the United States subject to pre-emption,

then such rule or regulation was absolutely invalid, illegal and void as against clear and expressed law. It follows that Quinn's application was illegally and improperly rejected.

This improper rejection of his application to file and otherwise show compliance with the law cannot, in any respect, prejudice his claim. He is to be considered as occupying exactly the same position in respect to the land that he would have occupied had that been done which should have been done.

When a person has done all in his power to obtain what he is entitled to, and is defeated by the wrongful act or neglect of a public officer, he is considered as holding the same position to have his rights determined as if all had been done which should have been done.

Story's Equity Jurisprudence, § 64.

In the case of Lytle vs. The State of Arkansas (9 How., 314,) this court passed upon the question now under consideration. One, Nathan Coyles, was in point of law, entitled to a pre-emption entry for a certain tract, having fulfilled the requirements of the statute and tendered payment, which payment was refused upon an erroneous construction of law by the register and receiver. He had attempted to do all that the law required, and had failed merely because a public officer had mistaken the law and failed to do his duty. And the court said:

"It is a well-established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer the law will protect him. In this case, the pre-emptive right or Cloyes having been proved; and an offer to pay the money for the land claimed by him under the act of 1830, nothing more could be done by him, and nothing

more could be required or him under that act. And subsequently, when he paid the money to the receiver under subsequent acts, the surveys being returned, he could do nothing more than offer to enter the fractions which the register would not permit him to do. This claim of pre-emption stands before us in a light not less favorable than it would have stood if Cloyes or his representatives had been permitted by the land officers to do what, in this respect was offered to be done."

"There is no question about the correctness of the doctrine here announced; it is only a familiar principle which is stated, that where one offers to do everything upon which the acquisition of a right depends, and is prevented by fault of the other side, his right shall not be lost by his failure.

"Yosemite Valley Case, 15 Wall, 91.

"Where a claimant is entitled to submit proof and offered to do it but is refused on the erroneous ground that he is barred by the lapse of time, his claim is not prejudiced by such refusal."

Morrison vs. *Stelnakor*, 104 U. S. 213.

To the same effect also are the following decisions of the Secretary of the Interior made under the administration of the land laws:

Wilson vs. *Morrison*, 2 Copp. 695;
Vettel vs. *Norton*, 3 Copp. 179;
Schmidt vs. *Stilwell*, 9 Copp. 171.

We accordingly submit that upon the pleadings and the evidence offered and improperly rejected, the cross-complaint of Quinn is well founded; that under the circumstances of the case he occupies the position of an equitable owner, that the legal title should have issued to him instead of to the heirs of Hollingsworth, and that the patent having been issued to the heirs, the grantee of the latter may now be held, in a proceeding of this

kind, as a trustee for the use of Quinn. We further submit that Quinn lost none of his rights by the erroneous rejection of his applications by the land officers of the Government.

SECOND ASSIGNMENT.

It follows from what has already been said that it was error in the court below to reject the evidence proving or tending to prove that the premises in controversy were included in the Rancho Laguna de la Merced. If the premises were so included and were so claimed at the time when Hollingsworth is alleged to have made his pre-emption settlement and during his life, then, under the conceded law of the case, the tracts in question were not subject to pre-emption settlement by any one. Hollingsworth's settlement even if made in good faith, and with intention to claim the land by preemption, was absolutely void and gave him no right which he could have asserted during his life time. After his death there remained no right which could be asserted in favor of his heirs. To reject any evidence proving or tending to prove these facts, was obvious error in the court below.

So, too, the rejection of the testimony of the witness Knowles to the effect that Hollingsworth never settled upon or claimed the land nnder the pre-emption law was obvious error.

Even if the land had been subject to pre-emption at the date of his alleged settlement, it is entirely clear that if, as a matter of fact, Hollingsworth never settled upon or claimed the land under the pre-emption law, he could have had no right thereunder during his life time, and that his heirs could have had no right after his death.

We have not attempted to cover all of the assignments of error found in the record. They are however fully disclosed and discussed. We invite attention to them as well as to the brief of counsel already filed and the able and exhaustive dissenting opinion of Thorton, J., found in the transcript, pages 103 to 116.

We also ask the particular attention of the court to the case of *Carr* vs. *Quigley*, 57 Cal. 395, a subsequent case in the same court, practically overruling the doctrine of the case at bar.

We submit upon the whole case that the decision of the Supreme Court of the State of California should be reversed and the cause be remanded for a new trial.

BARCLAY HENLEY,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

THOMAS QUINN, PLAINTIFF IN ERROR,

vs.

WILLIAM S. CHAPMAN, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF CALIFORNIA.

BRIEF FOR DEFENDANT IN ERROR.

This action was brought by WILLIAM S. CHAPMAN (the defendant in error), to recover from THOMAS QUINN (the plaintiff in error), the possession of Lots 4, 5 and 6, in Section 36, Township 2 north, Range 6 west from the Mt. Diablo base and meridian.

The COMPLAINT avers that the plaintiff (defendant in error) was then the owner in fee of an undivided half of the demanded premises, and that the defendant (plaintiff in error) was then in possession thereof, and withheld possession thereof from said plaintiff.

The ANSWER denies plaintiff's ownership, and sets up what is claimed to be an equitable defense, as is allowed by the Code of Civil Procedure of California. The same matters which are pleaded as a defense, are also set forth in a "CROSS-COMPLAINT," under Section 442 of said Code.

Plaintiff answers said cross-complaint, denying its material allegations, and so we have here, in substance, two suits—one in the nature of ejectment, brought by plaintiff below, and one in equity, brought by defendant below.

The Court filed Findings of Fact upon all the issues made by the pleadings—legal and equitable, and, upon them, judgment was rendered, that the cross-complaint be dismissed, and that plaintiff recover possession of the demanded premises.

A motion for new trial was made, and a "statement of the case" was settled, to be used on said motion; which motion was denied. No bill of exceptions was ever settled or filed in the case.

Defendant appealed to the Supreme Court of the State (California) from the judgment, and from the order denying a new trial; and both judgment and order were affirmed by that Court, on great consideration;—the case first being argued in one of the Departments of that Court, and afterwards a rehearing being had *in banc.* One of the seven Justices filed a very earnest and lengthy dissenting opinion.

At the date of my sending this brief to the printer, I have no copy of the transcript in this case, and, upon diligent inquiry, I cannot learn that money has been sent to the Clerk, to pay for its printing. Nor have I received any brief for plaintiff in error. I am obliged, of course, to anticipate the points in which it will be claimed that the Courts of the State have erred in this cause; for I can no longer delay filing my brief, as I learn from the Clerk, that the case is likely to be reached by the third or fourth week of the present month. Before discussing the equitable issues, however, some matters occur to my mind, which (if I view them correctly) will dispose of the case, without the necessity of discussing these questions, with which Court and counsel have wrestled while the action was pending before the State tribunals.

I.

The Judgment in favor of plaintiff below must be affirmed upon the pleadings, and findings of fact.

First. "There shall be no reversal "in the Supreme Court, or "a Circuit Court, upon a writ of error, * * * for any "error in fact."

§ 1011, U. S. Rev. Stat.

So, the Findings of Fact in the *nisi prius* Court establish the *facts* conclusively, for the purposes of this hearing.

Secondly. There can be no judgment here that any error of law intervened at the trial; for there is nothing in the *record* to show what took place at the trial.

1. There is no bill of exceptions in the case, and never was; and

2. The "statement of the case" included in the transcript on file in the State Supreme Court, is not a part of the judgment roll, and so is not a part of the record to be brought up to this Court on a Writ of Error.

It is merely a means provided by the Code of Civil Procedure of California, for reviewing *on a motion for new trial*, the proceedings at the trial.

As I understand the practice of this Court, and of all Courts, upon a Writ of Error,—no notice will be taken of alleged error in an order granting or refusing a new trial.

That comes *after* judgment. In Error, the question is only, whether error intervened in matters leading up to the judgment, or in the judgment itself.

I do not understand, that the original rule in English Common Law practice has ever been changed,—that, the return to a Writ of Error should embrace only the "record,"—the judgment roll.

Stephen on Pleading, *118-121;

Ibid,—pages 25, 27, 111,—Appendix XVIII-XXII.

3. By California statute, it is provided, that "immediately "after entering the judgment, the Clerk must attach together and "file the following papers, which constitute the judgment roll."

"In all other cases" (than that of judgment by default.)

* * * * * * * * * * *

" the pleadings, a copy of the verdict of the jury, or finding of the " Court, or referee, all bills of exception taken and filed, and a " copy of any order made on demurrer, or relating to a change of " parties, and a copy of the judgment." So, in this case, the judgment roll consists of

A—The Pleadings.
B—The Findings.
C—The Orders sustaining and overruling Demurrers.
D—The Judgment.

Section 670, Code of Civil Procedure.

These papers constitute *the record* here.

4. The "Engrossed Statement on Motion for New Trial," which was in the transcript on the appeal to the State Supreme Court, thus does not belong to the record, and cuts no figure here. It is not made part of the record, so that this Court will consider it, by merely being sent up with the return to the Writ of Error by the Clerk of the Supreme Court of California, or being printed with the record proper.

There is no provision for such a document in the rules of practice laid down by the California statutes, except in the sections of the Code of Civil Procedure, relative to a motion for new trial.

§ 659 first mentions it—directing, at Subdivision 3, how it shall be prepared, amended, and settled, "if the motion (for a new trial) " is to be made upon a statement of the case." In no other case, and for no other purpose, is any "statement of the case" authorized or provided for.

But bills of exception are defined and provided for, in another portion of the statute, not relating to new trials. They may be made on exceptions to a ruling at the trial, or even to the sufficiency of the evidence to justify a verdict or finding, and to any other ruling of the *nisi prius* Court.

When made, signed, and filed, they become a portion of the judgment roll, under § 670, just cited—as the "statement of the case" never does. On appeal, alleged error in the ruling of the Court below at the trial may be brought before our State Supreme Court for correction by means of such bill of exceptions, without any preliminary motion for new trial. This cannot be done upon a mere "statement of the case."

If such *bill of exceptions*, so filed, shows any error in any ruling

of the *nisi prius* Court at the trial, that would call for a reversal of the judgment by this Court, in a case brought before it by writ of error. In no other method than by such bill of exceptions, can any alleged error at the trial be brought to the notice of this Court in such case. I suppose that these propositions are elementary.

Thirdly. Findings 27 and 28, which are not even challenged by defendant as not sustained by the evidence, establish the ownership, at the commencement of the action, by plaintiff, of an undivided half of the demanded premises, and the possession of the same at that time by defendant; as also his withholding possession from plaintiff.

"All persons holding as tenants in common, joint tenants, or "copartners, or any number less than all, may, jointly or severally, "commence or defend any civil action or proceeding for the enforce- "ment or protection of the rights of such party."

§ 384, Code of Civil Procedure of Cal.

"The complaint in the case at bar is sufficient. It avers that "the plaintiffs are the owners in fee, as tenants in common, of the "premises; that the defendants are in possession of the same, and "withhold the possession thereof from the plaintiffs. Whatever "is alleged, beyond these averments, is immaterial and may be "stricken out. The facts essential to a good complaint are stated."

16 Cal., 220, *Payne* v. *Treadwell* (p. 247).

The finding that plaintiff was the owner of the demanded premises at the commencement of the action, is sufficient upon the question of title.

52 Cal., 217, *Smith* v. *Acker*.

Fourthly. All the Findings of Fact upon the matters alleged in the Answer, as constituting an equitable defense, and upon the averments of the Cross-Complaint, are squarely in favor of the plaintiff below, and against the defendant. So there is nothing in the record to shake the plaintiff's legal title under U. S. patent.

II.

The State Court in which the action was tried, had no jurisdiction to entertain the question sought to be raised by the third (equitable) defence, and by the cross-complaint: because it would be an interference of the State of California, by its Judiciary, with the primary disposal of the public lands of the United States within its limits, were the plaintiff, holding the title which passed by the U. S. patent, decreed by the State Court not the owner of the demanded premises,—or to convey them to defendant upon any of the grounds set forth in said defence or cross complaint, viz:—that the U. S. Land Officers erred in their action in issuing said patent.

First. The State of California was admitted into the Union upon the express "condition, that the people of said State, through "their Legislature or otherwise, shall never interfere with the pri- "mary disposal of the public lands within its limits."

1. As the State can only act through one of its three Departments,—Legislative, Executive, or Judicial,—this is, of course, a condition, that said State shall not, by its Legislature, Executive, or Judiciary,—"interfere with the primary disposal of the public lands within its limits."

2. So, if the Legislature should enact a law, undertaking to direct how the public lands of the United States shall be sold,—that law would *be void.*

Would it not equally be a void statute of the State, which should provide, that every sale of public land by the United States should, after patent issued, be examined by a State Court; and if it should be thus found that, under the U. S. land laws, such patent should lawfully have issued to some other person,—then the patentee should be decreed to transfer his title to such other person? Would such general statute be more objectionable than similar State action in any particular case? So, too,

3. If the Executive of the State should undertake in any way to direct how such sale should be made,—his proclamation and acts in that behalf would have no binding force.

4. If a State Court should by *Mandamus* direct a U. S. Land Officer to sell, or to patent to a particular person a parcel of U. S. public land,—or should, by Injunction, prohibit such sale,—its judgments, decrees, and writs in that behalf would pass by the officer "as the idle wind." These matters need no argument.

Secondly. If a State Court finds that the U. S. Land Officers have erred (whether in a matter of fact or law), in awarding certain public land to JOHN DOE, a pre-emption claimant, and that, upon the testimony,—the facts found by those officers,—or upon the law, as applied to those facts, they should have awarded the land to RICHARD ROE,—and *upon that ground only* (not because of any privity between the parties), such Court should decree JOHN DOE a trustee for the benefit of RICHARD ROE as to such lands, and compel him to convey the same to RICHARD ROE in pursuance of such trust;—evidently that Court would in substance as effectually "interfere with the primary disposal of the public lands," as if it had in the first instance directly compelled the sale and conveyance by the U. S. Land Officers of such lands to *Richard Roe* by *mandamus*, or prevented their sale and conveyance to *John Doe* by *injunction*.

For, although it does not thus control the issue of the patent, it does, in effect, make that not *a finality* in the matter of the disposal of the public lands; and, in effect, makes the execution of the decree of the Court the last step in the disposal of the lands, instead of the U. S. patent.

1. This is not the case of one man entering U. S. lands in his own name, with money belonging to another. In that case, any Court of Equity would hold the purchaser a trustee for the benefit of him whose money paid for the lands,—by reason of the privity existing between them:—not because of any error by the U. S. Land Officer,—for they do right to issue the certificate of sale to the man who comes and makes application for the lands and pays the purchase money. It is not for them to ask, whose is the money which he pays. They must presume it to be his own. So, in that case, the Court would simply seize hold of the conscience of him who has violated a private obligation, and remedy the wrong by holding him a trustee for the benefit of him whose money he has thus used. It thus *corrects his* wrongful act:—not an error of the Land Officers. But,

2. In the case at bar, to declare a trust because of alleged erroneous rulings of U. S. Land Officers, is purely and simply (in effect) to entertain an appeal from the rulings of those officers, and to reverse their rulings on such appeal.

Yet these officers are appointed by the General Government expressly to dispose of the public land, and, in so doing, to decide all questions that arise between rival applicants to purchase, as to their respective rights. This Court has held emphatically, that no Court can review the decisions of the Land Department of the United States on questions of fact.

13 Wallace, 72, *Johnson* v. *Towsley* (p. 86),

And while, in that case and in others, this Court has gone behind the decisions of that Department *on questions of law*, and for errors in law perpetrated therein, has made him, to whom the U. S. patent thus erroneously issued, a trustee for the party to whom it should lawfully have issued,—yet there is no case (that I know of) wherein it has upheld the right of a State Court to do this,—when it was brought to the attention of this Court, that there was such prohibition as there is in the case of California.

In fact, I cannot learn that this point has ever been raised in this Court; and so clear does the question seem to me, that I venture to ask the earnest attention of this Court thereto.

If, however, this Court should deem me wrong in assuming that the State Court in which this action was brought, had no jurisdiction to enforce any alleged trust upon the grounds claimed,—and that no alleged error even is presented by the record,—still

III.

No error was committed at the trial of the action, even upon the showing made by the statement of the case.

To intelligibly argue this matter, it is necessary that I should first state the nature of defendant's alleged

Equitable Defence.

The plaintiff made his title at the trial by producing a U. S. patent issued to "The heirs of George Hollingsworth,"—for the demanded premises,—and a deed of trust to him of an undivided half thereof, made by David, Benjamin and Edward Hollingsworth, and Virginia Jones (neé Hollingsworth), admitted to be the children and the sole heirs of said George, when said patent issued.

The defendant, in his Answer and Cross-Complaint, alleged, that said patent was issued upon an alleged settlement of Geo. Hollingsworth on the demanded premises, as a pre-emptor, in 1854, and his death before pre-emption entry;

That, in truth, and in fact, said Geo. Hollingsworth, never did settle upon said land; or inhabit or improve it, or erect thereon a dwelling house, as claimed, and as required by U. S. pre-emption laws.

That at the time of his alleged settlement, said land was within the exterior boundaries of the Mexican grant to Josefa de Haro,—known as the "Rancho Laguna de Merced,"—and so not open to pre-emption settlement,—and that it was not excluded from said grant, and so opened to pre-emption settlement until 1866;

That no U. S. survey or plat thereof was made and filed until March 19, 1868, when the township plat was filed in the U. S. Land Office;

That on the fifth day of February 1869,—defendant Quinn, having the qualifications required by law of a pre-emptor, settled upon said land, which was then vacant and unappropriated;

That he built a dwelling house thereon, and has ever since inhabited and improved the land as required by the preemption laws:

That prior to this, to wit: Nov. 12, 1867, the plaintiff, Chapman, filed in the Probate Court of San Francisco, a petition purporting to be signed by the children of said Geo. Hollingsworth, then deceased, and to be witnessed by Joe L. Bond and W. W. Pattison,—as also corroborating affidavits purporting to be signed

and sworn to by J. C. Kipper and Thomas Sanders. This petition was for the appointment of Chapman, as administrator of the estate of said Geo. Hollingsworth, deceased.

The cross-complaint alleges that all the material allegations of said petition were false;—that there was no settlement ever made by Hollingsworth on said land;—that he never had the wife and children mentioned in the petition; that the signatures attached thereto were "forged and simulated,"—as well those of the witnesses as of the alleged petitioners; that there were no such persons as Kipper and Sanders, and that the signatures and affidavits purporting to be theirs, were forged and simulated, etc.

As I do not propose to discuss these matters, it is only just to Mr. Chapman, that it should be noted here, that Quinn never offered any testimony in support of these charges of forgery, perjury, and subornation of perjury;—that in his deposition now on file in the case (but not used at the trial, because there was no evidence to be rebutted on these points) he confessed that he had no information which warranted these allegations,—that he never sought to ascertain whether these heirs of Hollingsworth, or Kipper and Sanders did live in Missouri, where these affidavits were made,—and that his only ground for making these terrible charges were, that he understood Chapman to be a "land-grabber," and thought he would be just the man to do these things!

The findings of fact on all these points are that these charges are false. That they are meanly, maliciously, and wickedly so, follows necessarily.

The Cross-Complaint goes on further to allege, that Chapman was, upon this petition, etc., appointed administrator of said estate; that, April 8, 1868, as such administrator, he filed in the U. S. Land Office at San Francisco, a declaratory statement in behalf of said heirs, for said land, based upon the alleged statement, inhabitancy, and improvement thereof by Geo. Hollingsworth;

That, at this time, one Obadiah Livermore, claiming under the State of California, and one Justus Beplar, claiming as a pre-emption settler, contested the claim of said heirs of Hollingsworth, and that a trial of the respective rights of these three claimants began in the U. S. Land Office at San Francisco, about August 18th, 1868;

That testimony was taken in said contest, from time to time, and that, on or about Sept. 2, 1869, the R. & R. decided in favor of the claim of the State, represented by Livermore;

That, on appeal to the Commissioner of U. S. General Land Office, this decision was reversed by him, and the land awarded to Hollingsworth's heirs; which decision was affirmed by the Secretary of the Interior, on Appeal, Jan. 6, 1871;

That thereupon the patent aforesaid issued to said heirs, as aforesaid stated,—Chapman making the payment for the land at the U. S. Land Office.

It is charged that, at the trial, Chapman imposed upon the Land Officers by false and perjured testimony, etc.,—as is generally charged with those dissatisfied with a Land Office decision. The finding is, that "no false testimony was offered at said hearing in "support of the claim of said heirs of said Geo. Hollingsworth."

It will be remembered that Quinn's own settlement is alleged to have been made Feb. 6, 1869,—about fifteen years later than Hollingsworth's settlement; nearly a year after the declaratory statement in behalf of Hollingsworth's heirs was filed (April 8, 1868), and nearly six months after the trial had commenced (August 18, 1868), in the U. S. Land Office, concerning this land, of the contest between Livermore, Beplar, and the heirs of Hollingsworth.

"Within three months of said settlement," as Quinn alleges,—or by the 6th day of May, 1869, at the farthest,—he offered for filing at S. F. Land Office, his declaratory statement. It will be seen, that this might be nearly nine months after testimony began to be taken in the trial aforesaid concerning said land, which trial finally closed August 24, 1869, as per the record of the U. S. Land Office in evidence.

The Register refused to receive this declaratory statement, on the ground that, *before Quinn's alleged settlement was made*, a trial of the contest had commenced in said Land Office between prior claimants for the same land, which was still pending.

The testimony of the Receiver (C. H. Chamberlain) shows, that the rule of the Land Office Department was, at that time, that during the pendency of a contest and trial between two or more claimants, a third party, whose claim had its incipiency at a date later than the commencement of such trial, could not be heard to contest the right of the contending claimants, nor would his declaratory statement be received until such contest was decided against all the prior claimants engaged therein, and the land thus shown to have been open to such party's settlement at its date.

This seems a reasonable and necessary rule, and the State Su-

preme Court so held it. Without it, a new claimant could put in a claim to the land just as the testimony closed (and as he would have the right to be present, hear evidence and cross-examine witnesses against him), all the testimony would have to be again gone over,—and so on, with every new claimant, *ad infinitum*. Whereas, if a prior claimant shows good title, it follows, necessarily, that the later claimant *could not* have title.

From the Register's refusal to receive this declaratory statement, Quinn appealed to the Commissioner, who affirmed it, as did the Secretary, on appeal to him.

Of course I shall take no notice of the alleged insufficiency of the evidence to sustain the findings. No question of fact arises in this Court, as we have already seen.

Without rehearsing in detail the alleged errors in law, it is enough to say, that so far as any Federal question is raised thereon, they all come down to the one question, whether defendant has, by the facts found,—or by the facts which he was prevented from proving by erroneous rulings of the *nisi prius* Court,—shown his *status* to be such, that he could be heard to attack the United States patent, under which defendant holds title, and to show that it was improperly issued, and that patent should lawfully have issued for the same land to himself,—thus making a case for the defendant to be decreed a trustee for plaintiff's benefit, of the patent title.

The case requires a discussion of questions and principles so long and so often settled and affirmed by this Court, that it seems an act of supererogation to now go over them again; and I can hardly hope to add anything to the force of the reasons given in the opinion of the State Supreme Court, for its decision in this case. So, I will be brief as possible.

A.

The patent of the United States, on which plaintiff's title rests, is conclusive evidence, as against all persons, except those who had a title which they could maintain against the United States, at the date to which said patent relates, that the land was, at that date, open to pre-emption entry; that every pre-requisite to its issue had been performed; and that it issued lawfully and to the person entitled to receive it from the Government.

"The patent is conclusive evidence of the right of the patentee "to the land described therein, not only as between himself and "the United States, but as between himself and a third person, "who has not a superior title from a source of paramount proprie-"torship."

13 Cal., 373, *Waterman* v. *Smith* (p. 379);
Ibid., 478, *Moore* v. *Wilkinson* (p. 469).

"Unless a patent is issued without authority, or is prohibited "by the statute, or is void upon its face, its operation against the "Government and those claiming by title subsequent, cannot be "questioned in any collateral suit. For errors, irregularities, or "fraud committed in any of the steps preliminary to its issuance, "inquisition can only be had in a proceeding taken directly for "that purpose."

Vide also,

15 Cal., 362, *Stark* v. *Barrett;*
17 Cal., 250, *Ely* v. *Frisbie;*
18 Cal., 11, *Teschemaker* v. *Thompson;*
Ib., 535, *Leese* v. *Clark.*

In the last cited case, the Supreme Court say of a U. S. patent, through the great lawyer, who was then its Chief Justice, (at page 572):

"Upon all matters of fact and law essential to authorize its "issuance, it imports absolute verity; and it can only be vacated "and set aside by direct proceedings instituted by the Govern-"ment, or by parties acting in the name, and by the authority of "the Government. Until thus vacated, it is conclusive, not only

" as between the patentee and the Government, but between parties " claiming in privity with either by title subsequent."

See, also,

17 Cal., 250 *Ely* v. *Frisbie* (p. 259.)

"It can only be impeached by the Government, by direct pro- " ceedings for its annulment or limitation." See, also,

45 Cal., 527, *Chipley* v. *Farris*;
53 Cal., 239, *Cruz* v. *Martinez*;
14 Cal., 279, *Boggs* v. *Merced Min. Co.* (p. 363);
16 Cal., 295, *Doll* v. *Meador* (pp. 324–330);
20 Cal., 388, *Leese* v. *Clark* (Second Appeal);
25 Cal., 440, *Kimball* v. *Semple* (p. 454).
27 Cal., 163, *Semple* v. *Hagar*;
29 Cal., 309, *Hagar* v. *Lucas* (p. 311);
34 Cal., 506, *Smith* v. *Athearn*;
38 Cal., 80, *Durfee* v. *Plaisted.*

From the beginning this Court has uniformly held the same doctrine, beginning with

9 Cranch., 87, *Polk's Lessee* v. *Wendell,*

decided in 1826; the great Chief Justice giving the opinion of the Court. (See page 98.) *Vide,* also

13 Peters, 436, *Bagnell* v. *Broderick* (p. 450);
11 Wheaton, 380, *Patterson* v. *Winn* (p. 383);
18 Howard, 87, *Minter* v. *Crommelin.*

In which last case the patented land was shown to have been reserved from entry by pre-emption many years before the pre-emption entry thereof on which the U. S. patent issued. The patent alone was held conclusive evidence, that the lands had been restored to entry before the first step taken to which the patent related back.

That the only way to get rid of the conclusiveness of such patent is by suit, brought directly to have it vacated, by the Government which issued it, is held in

4 Bibb, 329, *Bledsoe's Devisees* v. *Well;*
19 Howard, 323, *Field* v. *Seabury* (p. 332);
1 Vernon, 277, 370, *Att'y Gen.* v. *Vernon;*
2 Ch. Rep., 353, S. C.;
10 How., 348, *Landes* v. *Brandt;*

11 How., 552, *United States* v. *Hughes;*
3 Wall., 478, *Beard* v. *Federy* (p. 492);
4 " 232, *Hughes* v. *United States;*
10 Johns., 24, *Jackson* v. *Lawton.*

That the patent, by relation, establishes the title of the patentee from the first step in the proceeding in which it issues (in this case from Geo. Hollingsworth's pre-emption settlement in 1854),—so that one seeking to attack it must show a claim antedating that first step. *Vide,*

34 Cal., 506, *Smith* v. *Athearn* (p. 511);
20 Cal., 150, *Touchard* v. *Crow* (p. 160);
18 Cal., 11, *Teschmaker* v. *Thompson* (p. 26);
35 Cal., 85, *Morrill* v. *Chapman* (p. 88.

B.

The land patented must be conclusively presumed in all collateral proceedings to have been open to pre-emption settlement and entry by Geo. Hollingsworth, when he made his settlement therein:—for that was a question of fact, to be passed upon by the Land Department before issuing patent, and the patent is conclusive evidence of their decision. The correctness of its decisions on questions of fact coming before them cannot be questioned by any other tribunal.

13 Wall., 72, *Johnson* v. *Towsley* (p. 86);
102 United States 378, *U. S.* v. *Schurz.*

C.

The facts of Geo. Hollingsworth's settlement, inhabitancy, improvement, etc., of the lands in question, were (*under the same authorities*) *conclusively established by the decision of the U. S. Land Officers, upon which the patent issued, and of which the patent is conclusive evidence.*

D.

The Cross-Complaint shows no cause of action in any event, unless defendant shows by it, that he was himself entitled to the patent. It would do him no good to show merely that plaintiff had no right to it. To make plaintiff a trustee for defendant's benefit,—he must be shown to have acquired a title to which defendant had the better right.

31 Cal., 420, *Wilson* v. *Castro.*

The books state no other grounds on which a constructive trust can stand in such case.

E.

Defendant shows no right in himself to receive a patent, even if it had not issued to the heirs of Hollingsworth.

First. The defendant pretends to no right, otherwise than as a pre-emptor, and fails to bring himself within the requirements of the law as to such pre-emptors; for

Secondly. The pre-emption law then in force required as a condition precedent to a pre-emption entry, that the applicant should

1. "Make a settlement in person," etc., on the land;
2. "Inhabit and improve the same;" and
3. "Erect a dwelling thereon."

Sect. 11 of the Act of Sept. 4, 1841.

In Sect. 12, it is provided, that "*prior to any entries being made* "under and by virtue of the provisions of this Act, proof of the "settlement and improvement thereby required, shall be made *to* "*the satisfaction of the Register and Receiver* of the land district in "which such lands may lie, agreeably to such rules as may be pre-"scribed by the Secretary of the Treasury."

It will be seen at a glance, that the facts of settlement, inhabitancy, improvement, house building, etc., are made by this statute (under which alone defendant claims) no more indispensable to an entry thereunder, than "proof" thereof, "*to the satisfaction of the* REGISTER AND RECEIVER." *All* these things are indispensable prerequisites to the entry of public land by a pre-emption claimant.

Thirdly. It is not enough to prove these things to the satisfaction of any other tribunal,—Court, jury, or referee. The special tribunal is established, which must be *satisfied* with the proof. It is not enough that they *ought* to be satisfied with the proof offered,—or that any one else is satisfied. These officers are to be satisfied. What would satisfy this Court, or the Court below, in the way of proof, might not satisfy the R. and R. So, the defendant, not having made this proof, could not have made the entry, if the claim of Hollingsworth's heirs had been out of the way.

Fourthly. Nor has defendant filed the declaratory statement required by law. This alone would avoid all claim he might otherwise have to pre-empt the land.

Section 15 of Act of Sept. 4, 1841;
Section 5 of Act of March 3, 1843;
5 Stat. at Large, 620.

Fifthly. It is no answer to these last two propositions, to say that defendant was prevented from filing declaratory statement and making proof, by the refusal of the R. and R. to receive either; and so must be deemed to stand as if he had done both.

He had no right to do either when the offer was made, and the R. and R. rightfully refused to receive his declaratory statement or proof.

All these matters were under the control and direction of the Commissioner.

Act of July 4, 1836, "to reorganize the Gen. Land Office."

Proof was by law to be made under rules prescribed by the Secretary of the Interior (substituted for Secretary of the Treasury) and under rules so prescribed, neither the declaratory statement nor the proof could be received.

F.

The Land Department found the facts of Geo. Hollingsworth's settlement, etc., on land open to settlement, and no error of law is charged to have been committed by the Land Officers, or any of them. But it is only on the ground of such error of law, that a Court can go behind the decision of the Land Department in such cases. See:

Johnson v. *Towsley*, cited *ante*.

The defendant's charges of fraud on the part of plaintiff are not charges of error in law on the part of the Land Officers. We have seen that they are found by the trial Court to be false and unfounded.

G.

Defendant made no offer to prove the allegations of fraud made by him against the plaintiff.

A reference to the "Statement" will show, that the offer of defendant, rejected by the trial Court, was to prove that Hollingsworth never settled upon the land for himself, nor fenced, improved or cultivated it for himself,—etc., etc.;—and that, at the time of his alleged settlement on the land, it was embraced within the exterior boundaries of the Rancho Laguna de la Merced, a Mexican grant, and so not open to pre-emption.

This offer was refused, because these facts had been conclusively passed upon by the Land Officers. Clearly, there was no error in this.

It will also be seen that counsel for plaintiff expressly waived any and all objections to proof of the fraud and wrong doing charged upon plaintiff by the cross-complaint, and that defendant offered no evidence in support of said charges.

H.

The dissenting opinion of Mr. Justice Thornton, at the hearing before the State Supreme Court, is more zealous than accurate, in assuming as it seems to do that the defendant below was, at the trial, refused permission to prove his charges of "fraud and "imposition upon the officers of the Land Department, by the "parties under whom the plaintiff claims." (See 56 Cal., 288.)

A reference to the assignment of errors in law, at the close of the "statement of the case,"—will show that defendant does not claim that the Court refused to receive evidence of any alleged fraud practiced upon the U. S. Land Officers.

The nearest approach he makes to this is in assigning as error the refusal of the Court to receive the testimony of J. G. Knowles, by whom defendant offered to disprove all the *facts* found by the U. S. Land Department, in passing upon the case, and to prove "that "the setting up of a pre-emption claim to said land in the name

" of said Geo. Hollingsworth, deceased, was, from its inception, a " fraud upon the United States."

Certainly, this is no offer to prove any specific fraud practiced upon the Land Officers in the matter, nor is it an offer to prove, or to introduce, evidence in support of any allegation of the alleged equitable defence or cross-complaint.

The only allegations of fraud or imposition practiced upon the U. S. Land Officers, made in the pleadings, will be found in the amendment to the third defence and cross-complaint printed just before the Findings.

These allegations were that false testimony was used in the U. S. Land Office, to prove Hollingsworth's settlement, inhabitancy, etc., and that by false testimony, the Land Officers were deceived and imposed upon.

A glance at the statement will show that this was no offer of evidence in support of any of those charges. No evidence was ever offered to show what was the testimony given at the hearing, in the U. S. Land Office: much less to prove such testimony false.

It will further be seen by reference to the " statement of the case" (about five or six pages before the end thereof), that immediately after the De Haro grant papers were ruled out, " the plain- " tiff, through his counsel, then stated in open Court, that he " would waive all objection to any proof which defendant might " offer in support of the charges, and each of them, made in the " answer and cross-complaint, of fraud and wrong-doing on the part " of said plaintiff."

The other matters assigned as *errors in law* are:

1. Admitting a record of the U. S. Land Office, to rebut the presumption that the demanded premises (being part of a Section 36), passed to the State by the school land grant.

It is difficult to see the point of this, when, early in the trial,—just after the deed of the Hollingsworth heirs to Chapman was put in evidence—(see statement), " it was thereupon admitted and con- " ceded by the parties to this action, that the title to the land in " dispute never vested in the State of California."

2. The admission of the deed to Chapman, made by the Hollingsworth heirs.

This exception is too absurd for comment.

3 and 7. The rejection in evidence of the DeHaro grant papers.

These were offered, and again offered, to prove that at the time of Geo. Hollingsworth's settlement, the demanded premises were not open to pre-emption settlement.

Whether they were open to such settlement was a question of fact,—or at least, of mixed law and fact—upon which the decision of the U. S. Land Department is and must be *conclusive*.

Johnson v. *Towsley*.

There is no allegation in the pleadings that certain facts in that regard were found or proved in the U. S. Land Office, and that the officers erred in applying the law thereto.

4 and 5. The rejection of certain letters of the Commissioner of U. S. Gen. Land Office to Lane & Newman, then attorneys for defendant.

Since when, have any one's letters to third parties, been competent evidence in a suit against one not a party to the letters? Land claimants would not know whether they stood on their heels or their heads, if the Register or Receiver, Commissioner or Secretary, could manufacture evidence against them by writing letters to the other fellow's lawyers ! ! !

6. The rejection of defendant's offer of proof by J. G. Knowles.

As I have shown, this was merely to establish matters of fact, upon which the United States Land Office had passed in their decision of the case, and to show their decision incorrect.

8. In denying defendant's motion for judgment.

9. In making incorrect and contradictory findings.

These points surely need no discussion.

This examination *in detail* of the errors which defendant himself claims to have been committed by the Court, disposes entirely of Mr. Justice Thornton's "glittering generalities," and shows that his assumptions of wrong done defendant at the trial, will not bear an investigation; that the only matters which defendant offered evidence upon,—rejected by the Court,—were questions of fact, upon which the decision of the Land Officers was final and conclusive.

IV.

If, as claimed by defendant, and by Mr. Justice Thornton in his dissenting opinion, the United States Land Officers erred in refusing to receive defendant Quinn's declaratory statement, the result would be,—not to give him a right to the patent, without having filed the declaratory statement or made the proof required by law,—but to make the issuing of the patent irregular, and to make a case for the United States to bring suit to vacate it;—and then for the defendant's declaratory statement to be filed nunc pro tunc, and the contest to be gone over again in the United States Land Office, with opportunity for defendant to be heard therein.

An error in a United States Land Officer, doing injustice to an applicant to enter land, can only be remedied by placing parties where they would, be if no error had been committed. It cannot nullify a statute of the United States, and give a patent to one who has not performed the conditions precedent fixed by law.

RESUMÉ.

We claim then, for the defendant in error, that

First. The judgment is supported by the findings of fact.

Secondly. The sufficiency of the evidence to support those findings cannot here be inquired into.

Thirdly. Only the legal title of the parties can here be inquired into. The State Court, in which the action was brought, had no jurisdiction of the question raised by the alleged Equitable Defence and Cross-Complaint. Defendant's claim, under these pleadings, rests upon alleged error of U. S. Land Officers in their official action, by reason of which he claims that the patent title should be taken from the grantees of patentee, and transferred to him. For the State Court to do this, would be for the State of California, through its judiciary, to "interfere with the primary dis-"posal of the public lands within its limits."

Fourthly. As there is no Bill of Exceptions in the case, and the "Statement of the Case" is merely a means provided by California statute for bringing to the appellate Court, *on a motion for new trial,* a statement of the proceedings at the trial;—and as such statement is no part of the judgment roll,—of the "record,"—it follows that this Court has no means of ascertaining, at this hearing, what did take place at the trial of the case,—and so cannot pass upon any alleged error occurring at the trial.

Fifthly. Even were the statement open to this Court for the purpose of learning therefrom the proceedings at the trial,—still it discloses no error.

Sixthly. Defendant is not entitled to a conveyance of the patent title, because he makes no case showing that he ought to have received the patent, even had the prior claimants been out of the way.

1. If Hollingsworth's heirs had been out of the way, *non constat* but BEPLAR, the prior *pre-emption claimant,* or LIVERMORE, claiming under the State, would have received the patent;—the claim of each *antedating* that of defendant by some years.

2. Defendant never filed a declaratory statement, nor made proof of his personal qualifications, or compliance with U. S. pre-emption laws, "to the satisfaction of the Register and Receiver."

3. Nor can it be presumed from this mere refusal of the officers to receive his declaratory statement or proof, that he had a better case than either of the claimants having an earlier claim than his; nor that the proof made by him would have been satisfactory to the R. and R.

4. Not one case decided in any U. S. Court has ever held, that any holder of U. S. patent title could be held a trustee in relation thereto in favor of any claimant, who has never made his proof as required by the pre-emption laws. In all the cases except one, the party claiming the benefit of the patent issued to another, had proved up his claim, "to the satisfaction of the Register and Receiver," and that fact was not disputed.

20 How., 6 *Garland* v. *Wynn;*
9 How., 3-8 *Lytle* v. *Arkansas;*
18 How., 43, *Barnard* v. *Ashley;*
13 Wall., 72 *Johnson* v. *Towsley.*

In *Cunningham* v. *Ashley*, 14 How., 377, this fact did not confessedly appear, but the decision of the Court was made upon the ground in substance that from the facts shown, they had a right to infer that such proof was made.

In the case at bar, it is admitted that no such proof was made.

5. No evidence was rejected at the time, except that offered to show that the decision of the U. S. Land Officers on questions of fact, was incorrect.

6. The pleadings set up no error in law committed by the Land Officers, and no fraud, such as would furnish ground to impeach a decision of the Land Officers. As to what frauds these must be, *vide*

U. S. v. *Flint*, 4 Sawyer, 42.

It would seem that the judgment of the Supreme Court of California in this case must be affirmed.

GEO. A. NOURSE,
Counsel for Defendant in Error.